Exhibit B

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 05-44481(RDD)

- x

In the Matter of:

DPH HOLDINGS CORP, et al.

Debtors.

- x

Adversary No. 09-01510 (RDD)

In the Matter of:

ACE AMERICAN INSURANCE COMPANY, et al.,

V.

DELPHI CORPORATION, et al.,

- x

Adversary No. 11-02934(RDD)

In the Matter of:

CAI DISTRESSED DEBT OPPORTUNITY MASTER FUND LTD.,

V.

DELPHI AUTOMOTIVE PLC, et al.,

- x

United States Bankruptcy Court

One Bowling Green

New York, New York

March 22, 2012

10:19 a.m.

B E F O R E:

HON ROBERT D. DRAIN

U.S. BANKRUPTCY JUDGE

ECR OPERATOR: ELVIRA AGUIRRE-MORENO

Notice of Agenda Proposed Seventy-Fifth Omnibus Hearing Agenda:

(1) Motion by Reorganized Debtors to Enforce Plan Injunction Against Oldco Trustee;

(2) Motion by James Grai to Lift Stay;

(3) Letter Filed by Patricia Meyer;

(4) Motion by Michigan Defendants Regarding Lift Stay Order (Ad #09-0150);

(5) Complaint by CAI Plaintiffs for Declaratory Relief (Ad #11-2934)

Notice of Agenda Proposed Fifty-Third Claims Hearing Agenda

Adversary Proceeding: 09-01510-rdd ACE American Insurance Company et al v. Delphi Corporation, et al. Motion by Michigan Regarding Lift Stay motion

Adversary Proceeding: 11-02934-rdd CAI Distressed Debt Opportunity Master Fund Ltd. v Delphi Automotive PLC et al Pretrial Conference

Transcribed by: Sherri L. Breach, CERT*D-397

A P P E A R A N C E S:

SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLP
Attorneys for Debtors
155 North Wacker Drive
Chicago, Illinois 60606-1720

BY: NICK D. CAMPANARIO, ESQ.
AL HOGAN, ESQ.
LOUIS S. CHIAPPETTA, ESQ.

DEWEY & LEBOEUF, LLP
Attorneys for CAI plaintiffs
333 South Grand Avenue
Suite 3600
Los Angeles, California 90071-1530

BY: JAMES O. JOHNSTON, ESQ.

DAVIS, POLK & WARDWELL
Attorneys for Delphi Automotive, PLC
450 Lexington Avenue
New York, New York 10017

BY: BENJAMIN S. KAMINETZSKY, ESQ.

A P P E A R A N C E S (C O N T.):

DUANE MORRIS, LLP
Attorneys for ACE Companies & Pacific Life
1540 Broadway
New York, New York 1003-4086

BY: WILLIAM C. HEUER, ESQ.

DUANE MORRIS, LLP
Attorneys for ACE Companies
30 South 17th Street
Philadelphia, Pennsylvania 19103-4196

BY: LEWIS R. OLSHIN, ESQ.
MARGERY N. REED, ESQ.

ALSTON & BIRD, LLP
Attorneys for ACE Companies
90 Park Avenue
New York, New York 10016

BY: MARTIN G. BUNIN, ESQ.

A P P E A R A N C E S (C O N T.):

STATE OF MICHIGAN

BILL SCHUETTE, ATTORNEY GENERAL

Attorneys for Joint Michigan Defendants

Labor Division

5th Floor G. Mennen Williams Building

525 West Ottawa Street

P.O. Box 30736

Lansing, Michigan 48909

BY: SUSAN PRZEKOP-SHAW, ESQ.

DENNIS J. RATERINK, ESQ.

ALSO APPEARING:

PATRICIA MEYER

APPEARED TELEPHONICALLY:

FRANK LAROSA

ROBERT G. KAMENEC

SHAUN WONG

GEORGE BRICKFIELD

P R O C E E D I N G S

THE CLERK: All rise.

THE COURT: Please be seated.

Okay. Good morning. In re: DPH Holdings.

MR. CAMPANARIO: Good morning, Your Honor. Nick Campanario of Skadden on behalf of the reorganized debtors and we're here this morning for a claims hearing and an omnibus hearing.

THE COURT: Right.

MR. CAMPANARIO: On the claims side, there's nothing at all on the agenda and so there's nothing to be -- nothing to be done with regard to claims.

On the omnibus side there are five items on the agenda and we're prepared to proceed through those now, Your Honor.

THE COURT: Okay. That's fine.

MR. CAMPANARIO: The first item is the motion by reorganized debtors to enforce plan injunction against Oldco Trustee. That motion has been resolved and the reorganized debtors have filed a withdrawal of the motion. That's at Docket Number 21839. That's all I have unless Your Honor has questions about that.

THE COURT: No. That's fine.

MR. CAMPANARIO: Okay.

The second item is the motion by James Grai to

lift stay. As the Court is aware the parties are working toward a stipulation that would resolve this motion.

At this point DPH and ACE have completed and they've exchanged their analyses of the claimants that were covered by the motion. There were some discrepancies between the two analyses and we're working on reconciling those at this point.

In connection with that we had some questions for Michael Dowd who is the counsel for the claimants covered by the motion. We reached out to him with those questions and we're awaiting response on those.

THE COURT: Okay.

MR. CAMPANARIO: That's where we are on that.

THE COURT: Do the parties prefer doing this all -- all at once as opposed to just going ahead with the ones you agree with now and -- and saving the other ones for later --

MR. CAMPANARIO: Umm --

THE COURT: -- or is it -- do you think there will be a solution to this imminently?

MR. CAMPANARIO: I don't know if I would say imminently. I think we would prefer to wrap it all up in one stipulation. If -- if we complete the reconciliation process and for some reason it looks like it's going to take a long time to resolve some portion of them, it may make

sense at that point to --

THE COURT: Yeah. No. I --

MR. CAMPANARIO: -- consider --

THE COURT: -- I think you should do that.

MR. CAMPANARIO: -- splitting them off.

THE COURT: I mean, there -- there are -- I mean, they're real -- there are people waiting on -- on this money. It's important to them. So I think if the reconciliation issues are limited to a -- you know, a minority of the -- of the group and it looks like it's going to take, you know, a couple of more months to resolve those, then I think you should move ahead with the stipulation on the ones that everyone agrees on.

MR. CAMPANARIO: Understood, Your Honor.

THE COURT: Okay.

MR. CAMPANARIO: The third item is a letter and other materials filed by Patricia Meyer on a pro se basis. And I believe that Ms. Meyer may be in the courtroom today. I'm not a hundred percent sure.

THE COURT: Okay. All right. I -- I scheduled this matter. I don't know if -- is Ms. Meyer here or anyone on her behalf?

MS. MEYER: Yes, sir.

THE COURT: All right. You should -- you should come up, ma'am.

THE COURT: I got a letter from you in January of this year --

MS. MEYER: Yes, Your Honor.

THE COURT: I don't think it was served on anyone in this case, but it was -- I had it filed on the docket. And it appeared to assert claims either on your behalf or on behalf of other parties. It wasn't clear to me whether those claims were against Delphi or against GM. But it asked for me to take action and I can't take action on an ex parte basis. So I -- I -- I directed my chambers to contact you and ask if you wanted me to issue some sort of ruling or --

MS. MEYER: Yes, Your Honor.

THE COURT: -- consider some sort of relief, to get a hearing scheduled, which I gather you did for today.

MS. MEYER: I did, Your Honor.

THE COURT: What is the relief you are seeking?

MS. MEYER: The relief would be for the entire Delphi workers who -- or claim to be Delphi workers who never worked for them. Our agency has laws. They were advocate workers solutions.

THE COURT: I'm sorry. I can't -- I couldn't hear.

MS. MEYER: I'm sorry. Our agency has laws. It's

called Labor Advocate Workers Solutions. One of our members of our board was retired from General Motors American Axle, and in the past five years and up and before that time when she received her pension from the PBGC, our agency started working with the United States Government and the Federal Bureau of Investigation.

So the relief would be the proof of what we know about rulings in this situation with a worker who never worked for Delphi and who is now in the PBGC. We've worked with agencies for five consecutive years: the Federal Bureau of Investigation, the Labor Department, the head of the Internal Revenue. And the assumption was that we had gone to another law firm to ask for their advice and in asking that advice they said there was a ruling that they thought the Court should be aware of in this case. It's Rule 2008-45.

So if you ask what the compensation should be, it should be that -- that the -- there was fraud perpetrated in the case in this situation; that it was taken to all agencies, federal agencies and we were advised to come to give the information to you --

THE COURT: All right.

MS. MEYER: -- and I've done that today.

THE COURT: Okay. But -- well, all right.

MS. MEYER: Okay.

THE COURT: Other than pointing out to me your belief that there was a fraud perpetrated with the GM/Delphi spin-off -- that's the fraud you're referring to, right?

MS. MEYER: We're referring to that and the pensions of the Delphi workers. You have two classes of Delphi workers. You have ones who were Delphi employees and you have those who are not. And what happened in this case was it was brought to our attention and those workers actually went to the various law agencies and, at the advice of attorneys in the Grand Rapids, Michigan area, they suggested that we were able to prove that this was fraud and to bring it to your attention --

THE COURT: But the --

MS. MEYER: -- for compensation.

THE COURT: The “this” you're referring to is the spin-off and the assumption by Delphi of pension obligations that you say were really obligations of GM?

MS. MEYER: Yes. That is correct, Your Honor.

THE COURT: Okay. I -- I don't see how that -- those would constitute claims against Delphi as opposed to against GM.

MS. MEYER: If Delphi is in the PBGC, the employees --

THE COURT: If Delphi is what?

MS. MEYER: If Delphi has to their pensioners

(sic) put them in the public PBGC and these people were not part of that, that frauds the PBGC and payment for people who were never there. Delphi delegated it and if General Motors was responsible, that's acceptable. But it still lies in the hands of you, the judge, I would think owing that you have been in the Delphi bankruptcy.

THE COURT: Well --

MS. MEYER: Yes or no, Your Honor?

THE COURT: -- the termination by Delphi of its pension plans --

MS. MEYER: Yes, Your Honor.

THE COURT: -- the assumption of liability by the PBGC was a -- was a matter that was noticed before this Court on notice to the appropriate parties and was approved by the Court, and that order is a final order. It's res judicata and it's binding, and I don't believe there's any basis to overturn that order.

MS. MEYER: If the -- if you live in the United States and I came to you today honest on a claim that we could prove that the PBGC has cases. We've dealt with them. We've dealt with the Federal Bureau of Investigation. We've dealt with several agencies and they explained to me that they thought a letter should be sent to you about this.

THE COURT: Well, I -- I have -- I've received the letter and I don't believe that there is a --

MS. MEYER: Did you read the docketing of the --

THE COURT: Yes. Yes, ma'am.

MS. MEYER: Okay.

THE COURT: I did.

MS. MEYER: Okay.

THE COURT: And I note that the letter notes that you and your group were aware of potential claims arising from the GM/Delphi spin-off at least with the publishing in 1998 of the Delphi prospectus.

MS. MEYER: Yes, Your Honor.

THE COURT: And, (a) I don't believe that you're asserting claims against Delphi as opposed to claims against GM, which I think, at least based upon one of the pleadings attached to your letter or subsequently filed, has been the subject of litigation in the Delphi -- in the GM case, right? You filed a claim in the GM case and it was objected to?

MS. MEYER: It was objected to because it was Delphi.

THE COURT: Right. Well -- anyway, that's been dealt with in the GM case. I don't believe you filed a claim in Delphi's case, right?

MS. MEYER: I just sent you the letter and the information --

THE COURT: All right.

MS. MEYER: -- docketing what we had.

THE COURT: Delphi established a bar date in its case, early on in the case, on appropriate notice to those that it knew were creditors and publication notice to those that didn't know were creditors. In addition to that, under the confirmation order, which was entered more than three years ago, Delphi got a discharge. And I -- I believe that any claims against Delphi at this point are -- are barred by the bar date order and the discharge.

MS. MEYER: Then, Your Honor --

THE COURT: And I don't -- I actually don't really see that there is a claim against Delphi, in any event, given that the spin-off was a spin-off by GM. To the extent that there was any claim that Delphi might have against GM in respect to that spin-off, that was dealt with under the plan. GM got releases under the plan, on wide notice. The plan was confirmed. And, as I said before, the order approving the termination of the pension plan as well as the retiree benefits, that order is a final order now. It's -- it's not subject to appeal. And --

MS. MEYER: Okay, Your Honor. Then maybe you could advise me, because we've worked with the federal agencies and et cetera, and they suggested that I write the letter. Then are you saying that if -- if we find -- who do we go to? You have a final order, but --

THE COURT: I -- I don't --

MS. MEYER: -- if the PBGC --

THE COURT: I don't know.

MS. MEYER: -- doesn't take it --

THE COURT: I don't -- I don't know.

MS. MEYER: You don't know?

THE COURT: I don't know who you go to. I could tell you that having come to me on this point, I conclude that there's no viable remaining claim at this point given all of the orders that have been issued in this case.

MS. MEYER: All right.

THE COURT: -- on notice to parties.

MS. MEYER: Thank you very much, Your Honor.

THE COURT: Okay.

MS. MEYER: But you do not know where I go, then, right, with this?

THE COURT: I don't.

MS. MEYER: Okay. Thank you very much.

THE COURT: Okay.

I think Counsel for DPH should prepare an order consistent with that ruling.

MR. CAMPANARIO: Yes, Your Honor.

THE COURT: Okay. And -- and submit it to chambers.

All right.

MR. CAMPANARIO: May I address the Court from counsel table, Your Honor?

THE COURT: Wherever you're comfortable.

MR. CAMPANARIO: The fourth item is the motion by the Michigan defendants with respect to this Court's stay order, and Michigan defendants' counsel is present in the courtroom.

THE COURT: Okay.

MR. RATERINK: Good morning, Your Honor.

THE COURT: Good morning.

MR. RATERINK: Dennis Raterink appearing on behalf of the Michigan Funds Administration. I'm here, as usual, with my colleague, Susan Przekop-Shaw --

THE COURT: Good morning.

MR. RATERINK: -- representing the Michigan Workers' Compensation Agency. As always we are referring to our two clients as the joint Michigan defendants, as we share similar positions in regards to this matter.

THE COURT: Okay.

MR. RATERINK: Your Honor, we are here today in regards -- well, I -- I think I want to lay out at the beginning what we are here for and then what we're not here for in terms of our position.

We are here for discussion regarding our motion that we have filed with the Court to partially lift the stay

order that this Court had entered pending the appeal of the Court's order which had denied Michigan's motion to dismiss the adversary proceeding.

Those decisions have been appealed to, first, the U.S. District Court and to the Second Circuit Court of Appeal. On November 29th, 2011 the Second Circuit did issue a decision which affirmed Your Honor's overall decision, but made several pointed comments regarding a portion of this case, specifically the Form 400 liability issue that has been discussed throughout the litigation of this case. We would like to discuss the implications of those comments as it pertains to the stay order going forward.

What we're not here for today specifically, we're not here to rehash old events. One of the parties had indicated that – correctly, that the parties had expended considerable time and resources coming here before you originally to argue those issues and we don't intend to go back and rehash those issues.

What we do want to do is -- is have the opportunity to discuss the new developments that have arisen in regards to the Second Circuit's order.

THE COURT: Well, I don't view them as new. The first hour that I spent on this case in oral argument was to ask you and your colleague whether there could be a suitable agreement that the so-called Form 400 issue, divorced from

any issue with respect to the insurance policies, could be reached, because I would issue an order or "so order" such an agreement that that issue could go forward without any violation of the plan injunction.

MR. RATERINK: Correct.

THE COURT: And it's reported to me, and I think without dispute, that DPH and the insurer plaintiffs were prepared to reach such an agreement, but Michigan wasn't. And it seemed to me, at least from the oral argument on this point, that that was a fair representation.

I mean, if you're prepared to enter into that agreement at this point so that it's crystal clear to the Michigan court or the Michigan administrative body what -- what is before it and nothing else, this is a non-issue. It always has been.

MR. RATERINK: With due respect, Your Honor, I think you're -- you're correct that there was extensive discussion on the record back and forth regarding the potential to stipulate and try to settle that issue to see --

THE COURT: Right.

MR. RATERINK: -- if we could agree to send it back to Michigan. And there were limitations that -- that we had in representing our state client in terms of how far we could stipulate, what we were allowed to stipulate for,

whether we could stipulate as to issues of law, those kind of things as you will recall.

And the bigger issue that we have at this point now, after discussing with the appellate counsel that we've added to our team and talking with the solicitor general for the State of Michigan is, you know, one of the primary issues that's been litigated in this going forward is whether the Court's extension of its jurisdiction over these matters impinges on Michigan's sovereign immunity. And at this point to go forward with the stipulation pertaining to the Form 400 issue in limiting the, Michigan's abilities in any ways regarding going back would be an admission that this Court has jurisdiction over that issue to begin with.

THE COURT: Well, then, we should go through the appeal. I mean, it's --

MR. RATERINK: And --

THE COURT: -- one or the other.

MR. RATERINK: -- and we are.

THE COURT: All right. Then the stay should stay in place.

MR. RATERINK: And we -- we have been. And -- and I'll explain why I think the opportunity has presented itself to come back to you at this point.

THE COURT: Okay.

MR. RATERINK: You know, out of respect to Your

Honor to some degree because we think that there has been a change of circumstances. If you disagree, then -- then I'm sure the order you'll issue will reflect that.

THE COURT: All right.

MR. RATERINK: But we wanted to come back and talk to you and have a discussion about these issues and the implications of what the court specifically said.

It's important, we think, that the Second Circuit has set some boundaries about what this case -- what is properly before that Court and, by implication, this Court and what is not before that -- that Court and -- and, again, by implication this Court.

Before we get to the exact -- what -- exactly the court said I think it's important to give just a small amount of context because a lot of what happened occurred after you were -- we were before you, Your Honor.

THE COURT: Can I -- can I just interrupt you?

MR. RATERINK: Certainly.

THE COURT: I -- I've read the Second Circuit's summary ruling carefully, as well as re-read my ruling and Judge Marrero's ruling, and it appears to me that it's -- it's crystal clear that the Second Circuit has made it clear that all issues pertaining to the insurance policies and their effect are issues pursuant to which the bankruptcy court has jurisdiction and pursuant to which Michigan has

waived sovereign immunity. It's addressed very clearly.

Because Michigan is not prepared to limit the 401 issue or the 4 -- I'm sorry -- the Form 400 issue to an issue that does not involve the policy, I think that the issue that you're raising here, including in the context of the Second Circuit's summary ruling is a red herring. If it were solely limited to that issue, then from the start of this case it's been clear that that issue, the 400 issue, could be decided. But it's not, and you've just told me it wouldn't be because you don't want to waive sovereign immunity on -- on the related issue.

And, accordingly, I need to decide the issue of the policy. And I believe that if Michigan were to go forward and determine what it has termed to be the 400 issue, I believe what it -- as it construes that issue, that includes issues with respect to the policies and, therefore, it would be violating the plan injunction.

So not being prepared to limit the issue to simply the real Form 400 issue, which is separate and apart from the policy, it appears to me that I need to decide, first, the policy issue. Once the policy issue is decided, you can go and decide the Form 400 issue. The Form 400 issue, as the Second Circuit said and as the complaint makes clear, is not in front of me, the pure Form 400 issue. It's not part of the adversary proceeding. It's just the policy.

So once I decide that, there will be a pure Form 400 issue and you can decide that separately. I don't think that there would be res judicata or collateral estoppel because it wouldn't cover that issue, except to the extent that it is determined that there is a defense to the Form 400 theory which is that it pertains to -- it must be limited to whether there is a policy or not. That would be collateral estoppel and res judicata because I would have decided that.

MR. RATERINK: Understood. I think the main distinction we would take with Your Honor -- Your Honor's analysis is that the -- the implication of the Court's ruling. You -- you've used the term --

THE COURT: The Second Circuit's ruling.

MR. RATERINK: Yes. The Second Circuit's ruling.

THE COURT: Okay.

MR. RATERINK: I'm sorry.

THE COURT: All right.

MR. RATERINK: You've used the terms a couple of times, the “pure” 400 issue, and I understand what you mean by that. But the -- that's not a term that the Second Circuit used. The Second Circuit spoke in terms of the Form 400 issue. I mean, there can be no doubt, and we can -- we can document the record, the pleadings and -- and Your Honor's previous orders make it clear that -- that Your

Honor felt that you had jurisdiction over the Form 400 issue for the reasons that have been stated previously.

THE COURT: I'm not -- no. It -- to the contrary. I didn't -- no. Only to the extent that it implicates the policies.

MR. RATERINK: That -- that's what I mean. You had indicated --

THE COURT: Right.

MR. RATERINK: -- that you thought it was intertwined and couldn't be separated.

THE COURT: Right.

MR. RATERINK: So to that extent you thought that you had jurisdiction over those issues.

THE COURT: Not -- not over -- again, only to the extent that the policy is implicated; otherwise I don't, and I -- I -- that's why I said you all should -- if you really believe it's a separate issue, I'll “so order” a stipulation and it will be clear to the Michigan Court. It will be clear to the parties and we'll -- you know, you can go forward on that basis.

MR. RATERINK: And -- and we talked about the stipulation and those --

THE COURT: Right.

MR. RATERINK: -- same difficulties that we had previously still remain here.

THE COURT: All right. Well --

MR. RATERINK: We can't stipulate for parties that are not before the Court.

THE COURT: Okay.

MR. RATERINK: We can't control other people and other individuals.

THE COURT: Well, let me -- let me interrupt. Maybe --

MR. RATERINK: Sure.

THE COURT: Maybe -- maybe this is an issue that - where there have been discussions between the parties and I'm just -- I'm not aware of those or I'm missing something.

Separate and apart -- this is really a question for ACE. Separate and apart from whether there is a policy that covers these claims and/or whether it should be reformed, is ACE asking me to decide just on a pure regulatory basis that the filing or non-filing of a Form 400 doesn't create liability?

MR. OLSHIN: Your Honor, Lou Olshin. We've not asked you to look at the question that you attempted for eighteen months to separate out from the case.

THE COURT: Okay.

MR. OLSHIN: And there's been, at least by my count, six opportunities through the various appeals and proceedings and today for Michigan to say, yes, we consent

to the entry of ACE's motion for summary judgment which finds that there's no liability under the policies. They've refused to do that and I think we've spent numerous hours and a lot of the Court's time trying to unravel, and now it sounds like we have an appeal that -- or a cert petition to the United States Supreme Court. Obviously, our concern is that it's clear from the prior records before Your Honor, the District Court and the Second Circuit --

THE COURT: Well, I -- I'm sorry. I didn't -- I'm going to interrupt you. I was just really trying to --

MR. OLSHIN: Okay.

THE COURT: -- focus on this one question.

So -- so, for example, except for the ruling you're seeking from me that there is no ACE policy that covers these claims --

MR. OLSHIN: Right.

THE COURT: -- or that if -- that there's -- there should be a reformation of the policy --

MR. OLSHIN: To conform to the parties' intent.

THE COURT: -- to conform to the parties' intent, you are not seeking a ruling interpreting Form 400.

MR. OLSHIN: Correct.

THE COURT: Okay. So --

MR. OLSHIN: But --

THE COURT: -- it's not even in front of me,

consistent with what the Second Circuit said, and, I think, consistent with what Judge Marrero said and what I said.

MR. OLSHIN: But the issues on the merits before this case became intertwined because Michigan refused to stipulate --

THE COURT: Right. No --

MR. OLSHIN: -- to that concept.

THE COURT: -- I -- yeah.

MR. OLSHIN: And I think we spent a lot of time on the record running through that --

THE COURT: Okay.

MR. OLSHIN: -- issue as DPH Holdings pointed out in their papers.

THE COURT: Now one other thing you said, and I -- I should have asked you -- I should have asked counsel for Michigan this question. Has -- has a petition for cert already been filed?

MR. RATERINK: It has not been yet.

THE COURT: It has not, okay, because it's not until April --

MR. RATERINK: 8th or --

THE COURT: -- 10th or 11th or something --

MR. RATERINK: Correct.

THE COURT: -- that's your deadline. Okay.

MR. RATERINK: Correct.

THE COURT: Well, I mean, if -- if I'm not -- if I'm not going to be asked to decide the Form 400 point separate and apart from whether there's a policy in place, I think the issue of whether there's jurisdiction or sovereign immunity is moot and that's -- that's why the Second Circuit didn't deal with it, I didn't deal with it and Judge Marrero didn't deal with it.

MR. RATERINK: Well, I -- I think that there's a -- a distinction, Your Honor -- a difference of opinion here because you read the second report -- the Second Circuit's opinion to say the Court is saying that the issue of the Form 400 is not before it, the pure 400 issue. But, again, I would reiterate the court never says anything to that extent. It doesn't even say --

THE COURT: But it --

MR. RATERINK: -- that the issue regarding the interrelation -- it just says the Form 400 --

THE COURT: All right.

MR. RATERINK: -- issue is not before it.

THE COURT: But -- but it -- but it very clearly says that all issues pertaining to the existence or interpretation of the insurance policies are front and center and, you know, that's what its opinion says in -- in, you know, a pretty thorough way for a summary opinion. There's -- there's core jurisdiction with a waiver of

sovereign immunity.

So to the extent that Michigan is saying that the Form 400 issue includes issues with respect to whether and -- and where there is a policy that covers these claims and what that policy says is part of the Form 400 issue, then it -- I -- it's pretty clear to me from the Second Circuit's opinion that that's something I have jurisdiction over; and that's what the complaint is seeking.

What they say is the complaint isn't seeking relief on -- on the 400 issue, and since I -- it's pretty clear what the complaint is seeking relief on, I have to assume it isn't the so-called -- what I'm calling the pure Form 400 issue because it's seeking a -- the complaint is seeking relief on a declaration as to the policy. And -- and they've clearly ruled on that.

MR. RATERINK: Well -- and --

THE COURT: And so I think there's only one in -- one possible interpretation of what -- what they're saying.

MR. RATERINK: And you're -- and you're referring to the pure 400 issue?

THE COURT: Right.

MR. RATERINK: And, again -- and for the record we -- we would argue that the Court's opinion can be interpreted differently and --

THE COURT: Okay.

MR. RATERINK: -- can be interpreted to say that -- that there can be no question of the fact that the Michigan defendants from the get-go have argued that this Court doesn't have jurisdiction over the litigation of the Form 400 issues in any manner, even with the interplay issue, and have continued to advance that argument at every stage of the process.

So, then, for the Second Circuit to come back in its opinion and indicate that there is no 400 base claim in the complaint, that was absolutely correct. The complaint was not sounded in -- in terms of the Form 400. But Your Honor himself indicated on Page 6 of his -- of your order denying the motion to dismiss that the insurers were seeking the declaration that the insurers are not liable under either theory espoused by the agency.

So, clearly, the issue was before --

THE COURT: But you --

MR. RATERINK: -- the Second Circuit.

THE COURT: But I -- then I -- then I spent like a whole page explaining why the State of Michigan, frankly, was talking through its hat, as I spent two hours, and the parties spent probably countless hours, nailing down. I mean, it's just not -- it's not credible. I'm sorry. I spent too much time on this. It is -- and it's -- it's -- it's clear to me. And we've spent, you know, fifty minutes

on it today. The State is still not prepared to limit the issue to simply the issue of, is the insurers' liability driven by the form, and it's because they want to say that -- - or they're worried about the insurers' defense that -- that that incorporates the policy, and if there's no policy, the form doesn't apply.

So I don't know how, you know, I could -- any -- any of the three courts could be any clearer on this issue. And I'm not just not prepared to lift the stay, particularly knowing, and I appreciate the candor, that -- that Michigan would, in essence, argue the policy issue in front of the Michigan court.

MR. RATERINK: Well, and just to make clear on that, Your Honor, there -- there were discussions regarding that interplay about if a contract was raised on -- as a defense --

THE COURT: Right.

MR. RATERINK: -- to the Form 400 issue. I think we've made statements in the pleadings that -- that are accurate. We don't think the Form 400 really is base -- is reliant on the contracts. We are --

THE COURT: Well, I mean --

MR. RATERINK: -- regarding that.

THE COURT: -- you could stipulate to that and I'll -- I'll lift the stay, as I was prepared to lift it

eighteen months ago and the people of -- you know, the claimants can maybe get some money on that basis, you know, if the Michigan State Court agrees with that. But I don't think that's going to happen. I mean, I don't think that's how -- if I just simply lift the stay, it won't -- that won't happen, that -- that narrow determination won't happen. So it needs to be in writing, signed by Michigan, and I -- and Michigan is not willing to do it. And I -- I appreciate why it's not willing to do it. It doesn't want to waive this contract issue.

MR. RATERINK: Well, Your Honor had also evidenced some concerns at the original hearing that even if Michigan was able to stipulate to the extent to say that the insurance contracts were not germane to the issue of the Form 400, that the magistrates themselves, the other parties who are not here today, the plaintiffs and any potential co-defendants, would not be bound by that stipulation.

THE COURT: But they would be -- they would be bound by the stay. I would basically say the stay is -- is lifted for this issue.

MR. RATERINK: You would -- you would say the stay would be lifted -- partially lifted to allow the pure 400 --

THE COURT: Right.

MR. RATERINK: -- issue to go forward.

THE COURT: Similarly to the plan injunction would

have been lifted. You know, that was the whole premise of the --

MR. RATERINK: Right.

THE COURT: -- and -- and you can certainly say in a stipulation that, to the extent that -- that no one is -- is entitled to argue that to the extent this might constitute a waiver of sovereign immunity that it applies to any other issue in the case or any other issue ever raised by Michigan as far as sovereign immunity is concerned.

MR. RATERINK: Understood. And we may be able to engage in further discussions along those lines, not detracting from the fact that we do think the Second Circuit has provided clear guidance in -- in a different manner that the --

THE COURT: Okay.

MR. RATERINK: -- judge interprets what they have said in this case.

They had every -- they had every ability to come back and say we think to the extent that the Form 400s implicates these insurance contracts, that this Court does have jurisdiction and sovereign immunity is not implicated. They didn't say that.

THE COURT: It --

MR. RATERINK: They just said the Form 400 --

THE COURT: It wasn't in front of them.

MR. RATERINK: -- issue was not before it.

THE COURT: -- the complaint doesn't --

MR. RATERINK: Right.

THE COURT: -- it's -- they -- they shouldn’t -- there's no reason why they would rule on something where the complaint's -- doesn't cover that issue.

MR. RATERINK: But the complaint wasn't the only issue. As your Court -- as Your Honor recognized, the issue in the -- in the ongoing litigation of the case, the Form 400 issue was not raised until the defendants came to the State of Michigan. The Michigan defendants came in and said, wait, Your Honor, there's a further jurisdictional issue here. So as -- as things got litigated further on down the line, then the plaintiffs -- ACE in this case -- said, well, yeah, we want a ruling as to both, both on the contracts and the Form 400. That's the both theories of liability that's --

THE COURT: But their --

MR. RATERINK: -- stated in your contract.

THE COURT: -- their counsel has just stated -- stated to the contrary.

MR. RATERINK: I'm sorry.

THE COURT: They want a ruling only as far as their defense about there being a policy. They're not -- they're not -- they are not seeking a ruling from me that,

on its own, their form, if they -- if they don't have a policy that covers this, would or would not make them liable. They're not seeking that ruling in front of me.

So, therefore, my -- my ruling either way on -- on the complaint wouldn't be res judicata or collateral estoppel on that narrow issue. It would be as far as, you know, if the parties then try to incorporate the policy terms into the form in some way, then it would be res judicata, but -- or collateral estoppel. But, again, that separates out the two issues.

MR. RATERINK: Understood.

THE COURT: So I -- I mean, I -- I just -- I -- I'm going to deny this motion, then.

MR. RATERINK: Can I --

MS. PRZEKOP-SHAW: Your --

MR. RATERINK: -- take a moment to confer --

THE COURT: Sure.

MR. RATERINK: Thank you.

(Pause)

MS. PRZEKOP-SHAW: Your Honor, Susan Przekop-Shaw on behalf of the Michigan Workers' Compensation Agency. How are you? Good.

What I wanted to cover before -- I know I heard you just say that you deny it, but I would like to have the opportunity on the agency's behalf to place some information

on the record.

THE COURT: Okay. That's fine. I thought you -- your co-counsel was speaking for both of you, but that's fine. You can go ahead.

MS. PRZEKOP-SHAW: Thank you very much.

The Court just said that -- that ACE wanted to find out whether they are liable under the insurance contracts or policies for purposes of workers' compensation benefits. I think the question is whether -- whether ACE, under those contracts -- let me switch it. The question -- if the question is further narrowed in this manner whether Delphi has any obligations to pay workers' compensation benefits under the policies, that's distinctively different than saying ACE has no liability under the insurance policies because the issue before Michigan is not contractual in nature, as the court acknowledged in the Second Circuit. It's a situation of ACE's liability apart from the contractual theory.

So if the Court would consider drafting it so that it's a stipulation that under these policies Delphi has no obligation to pay for any workers' compensation benefits in Michigan under the policies, that's more accurate.

And in regards to that, and similarly, the problem that we're running into here is ACE continues to call them the self-insured workers' compensation obligations. That's

not what it is. It's not self-insured workers' compensation benefits that are pending in Michigan right now. It's workers' compensation obligations, period. Delphi is -- was responsible for the self-insured workers' compensation benefits that they -- because they were self-insured status in Michigan were required to pay. And in that case Delphi was paying each one of the benefits.

Once this plan was entered and the injunction was entered, Delphi -- the self-insured workers' compensation benefits in the sense solely towards this contract no longer existed. There may be some post-petition claims and other claims that are pending that are within the -- Delphi's responsibility. But in regards to this issue on the contract policy, if you flip it and reflect -- and that's what's the Court's job. It's not what ACE's liability is. It's what DPH Holding is obligated to pay.

And if -- if the Court considers that type of interpretation, that that's where this is going, I think that would be more attuned to what we're saying here because in Michigan there -- we -- we do maintain that the Form 400 base claim is not based on any contract because that self-insured contract -- insurance policy no longer exists. It's -- it's not -- it's not available for the Michigan employees who have claims -- excuse me -- the Delphi employees who have claims before the administrative law judge.

THE COURT: But why does it no longer exist?

MS. PRZEKOP-SHAW: Because the plan objection -- the plan injunction, you released Delphi from paying any more self-insured obligations. And if the plan, as they maintain, is based upon self-insurance --

THE COURT: But -- but --

MS. PRZEKOP-SHAW: -- there's no issue.

THE COURT: -- but let me -- but, again, this is -- this goes back to the stipulation we -- we started the whole case with. And the Second Circuit was very clear on this. They cited the same cases I cited, including PSI Net. If, in fact, the insurers' liability under Form 400 depends upon whether or not there is a policy, they will have a claim depending on one outcome or they will not have a claim depending on the other outcome of that issue in this bankruptcy case.

And so, therefore, it's front and center for me.

On the other hand, if the issue is clearly delineated for the Michigan Court that the existence of a policy is completely out of the picture as far as the Form 400 liability, then I -- I agree with you. But that's not -- I don't think that's the case, because the parties haven't been able to limit it in that way.

So I -- it comes right back to the analysis that appears at -- at Page 6 of the -- of the Second Circuit's

opinion, and in both Judge Marrero's and in my opinion.

MS. PRZEKOP-SHAW: But in -- when you take it into that position then you are infringing or -- or basically by taking the position that you said instead of what I was initially proposing, then what's happening is that you are imparting the bankruptcy court's authority over what can and can't be said in that --

THE COURT: Well --

MS. PRZEKOP-SHAW: -- in --

THE COURT: -- I -- you know, I think at this point that's an argument you need to be making to the Supreme Court.

MS. PRZEKOP-SHAW: Okay. Fair enough.

One other point I wanted to say, and I would really like this corrected. The Michigan defendants are the funds administration and the workers' compensation agency. We don't speak on behalf of the State of Michigan. And one of the points that kept --

THE COURT: I'm just using --

MS. PRZEKOP-SHAW: -- that kept coming --

THE COURT: I'm just using shorthand when I say Michigan.

MS. PRZEKOP-SHAW: Okay, because I -- there is a major distinction because you even used the term state. But, remember, it's the agency and the funds administration.

THE COURT: Right.

MS. PRZEKOP-SHAW: We're not here speaking on behalf of Mr. Dowd and on behalf of the plaintiffs that are there.

THE COURT: No. I understand,.

MS. PRZEKOP-SHAW: If this Court ended up making its decision, separating out the two entities, making its decision I would anticipate it would be earlier than later. But if this Court made its decision as to the insurance policy and -- and permitted it to be going back, you know, that -- that's a situation where -- and something happens, we've maintained that the agency and the funds administration continue to state that contracts are not part of this Form 400 matter.

And in regards to that -- in that -- in that indication, others like Mr. Dowd or other entities may start turning to the insurance policies again. We can't control that necessarily. We can't control that. That's part of it. And -- and the Court saying that it needs to control that, it needs to control that because of the policy is where we feel that the sovereign immunity arises. And -- and, obviously, that's an issue that we can take to the -- to the Court --

THE COURT: Okay.

MS. PRZEKOP-SHAW: -- to proceed on with it.

Anything else?

MR. RATERINK: No.

MS. PRZEKOP-SHAW: Thank you for your time.

THE COURT: All right. Thank you.

MS. PRZEKOP-SHAW: I guess you're going to make a ruling right now, right?

THE COURT: Well, unless I -- unless the other parties have something to say?

MR. OLSHIN: I think we've covered it, Your Honor.

THE COURT: Okay. All right.

I have a motion before me by the State of Michigan Workers' Compensation Insurance Agency and the State of Michigan Funds Administration, two of the three defendants in this declaratory judgment action brought by ACE American Insurance Company and Pacific Employers Insurance Company. I'll refer to them as the Michigan agencies, although one of them is an administration instead of an agency, for ease of reference.

The Michigan agencies seek a modification of an order entered by this Court in late January, January 28th, 2010 granting a stay in this adversary proceeding pending the Michigan agencies' interlocutory appeal of my order from earlier that month denying the Michigan agencies' motion to dismiss or abstain in the adversary proceeding.

The stay pending appeal was, obviously, for the

benefit of the Michigan agencies so that the proceeding wouldn't go forward in accordance with my ruling pending the appeal. But to protect the plaintiffs, as well as the co-defendant, DPH Holdings, I imposed conditions on the stay which did not include a bond, but did condition the stay on the agencies continuing their standing down on their proceeding with actions in Michigan pertaining to the issues that were on appeal. They are specifically set forth in subparagraphs (a) through (c) in the January 28 order.

The motion is premised upon language in the Second Circuit's summary order affirming the District Court, Judge Marrero, which in turn affirmed my ruling from January 2010, in which, generally speaking, the Second Circuit stated that this Court does, in fact, have core subject matter jurisdiction over this adversary proceeding and that the Michigan agencies are deemed to have waived sovereign immunity under the U.S. Constitution Article I, Section 8, Clause 2 as interpreted by, among other authorities, Central Virginia Community College v. Katz, 546 U.S. 356-77 (2006).

The basis for the present motion is language that appears in two places in the Second Circuit's summary ruling. First, the Second Circuit said:

"The Michigan defendants argue that the adversary proceeding is only nominally about the insurance contracts and is actually about whether the insurers are liable under

Michigan law for filing Form 400 notices of coverage. We disagree.

"As the District Court and the bankruptcy court concluded, the disputed issue in the adversary proceeding is one sounding in contract. The adversary complaint makes clear that the proceeding is focused on the parties' responsibilities under the contract. There is no Form 400 base claim in the insurers' adversary complaint.

"Although the Michigan defendants may ultimately prevail on the merits on their Form 400 theory, that argument ultimately bears on the merits of whether the insurers are liable apart from their contractual obligations, which is not the question before us on collateral review of the district court's denial of the motion to dismiss the adversary complaint."

And then in paragraph -- I'm sorry -- in Footnote 2 to the ruling the Court states:

"This decision is limited to the matters before us. We express no view and render no decision as to whether the bankruptcy court has jurisdiction over any claim or challenge to the liability of the insurers for filing the Form 400 notices. Likewise, we express no view and render no decision as to whether resolution of any claim brought in federal court against the Michigan defendants would invade their sovereign immunity."

This issue is not a new issue in this matter. In fact, as noted during oral argument, it was the first issue raised by the Court at oral argument on the Michigan agencies' motion to dismiss. The Court noted -- that is, this Court noted, that if one could divorce the so-called Form 400 theory from issues pertaining to whether there is an applicable insurance policy and, therefore, whether the debtor, having assumed all the policies, would be liable to the insurers under such a policy, then this Court, the District Court, and, I believe, the Second Circuit have made it clear that that -- that dispute, the so-called, what I call “pure” Form 400 theory dispute could proceed separate and apart from, ultimately, the plan injunction issue pursuant to the confirmation order in this case.

However, as addressed first by me at Pages 20 through 21 of my bench ruling on the motion to dismiss, as well as by Judge Marrero, the parties and, in particular, the Michigan agencies, have not been able to separate those issues or divorce them, either as a matter of law or as a matter of stipulation through -- that would be “so ordered” by the Court.

Consequently, it was clear to me in January of 2010 and I believe is still clear to me today, based on the very candid remarks of Mr. Raterink, that if I were to modify the stay pending appeal to permit what Michigan

contends is the Form 400 theory to proceed, it would subsume the issues that are raised in this adversary proceeding, issues that the Second Circuit has been crystal clear on are ones that this Court has jurisdiction over because those issues, as the Second Circuit stated, pertain inexorably to whether there is going to be a viable claim or not against the debtor's estate as well as to whether the debtor has an insurance policy, or not, with the plaintiff insurers.

The Michigan agencies contend that I should review or consider their motion under Bankruptcy Rule 7062 and, more specifically, Bankruptcy Rule -- I'm sorry -- Bankruptcy Rule 7062 -- I'm sorry -- or more specifically Federal Rule of Civil Procedure 62, which is incorporated by Bankruptcy Rule 7062 and more specifically Federal Rule of Civil Procedure 62(c), which deals with injunctions pending an appeal of an interlocutory order.

However, I think that the proper way to look at this is under Bankruptcy Rule 8005, which deals with stays pending appeal and was the rule under which I entered the January 28, 2010 order, which states, in pertinent part:

"Notwithstanding Rule 7062, the bankruptcy judge may suspend or order the continuation of other proceedings in the case under the Code or make any other appropriate order during the pendency of an appeal on such terms as will protect the rights of all parties in interest."

So, even to the extent that there's changed circumstances that would justify modifying the order, I believe in light of the very strong risk -- in fact, I believe certainty -- that the contract and claim issues that are front and center in this adversary proceeding are -- and, in fact, are the only issues in this adversary proceeding, would be raised if I modified the January 28, 2010 order to permit the litigation based on the Michigan agencies' definition of the so-called Form 400 issue; that it simply would not be fair and protective of the parties to modify the stay.

If the Michigan agencies want to preserve their full panoply of arguments under their Form 400 issue, including their arguments with respect to the insurers' policy defense, then they need to wait upon a ruling on their petition for cert, or, if they decide not to seek certiorari of the Second Circuit's ruling, then we can proceed on the merits of what is clearly before the Court in the adversary proceeding which, again, as correctly stated by the Second Circuit does not include this pure Form 400 issue, but only whether there's a policy in place, or reformation.

So I will deny the motion and I'll ask counsel for the insurers to submit an order consistent with this ruling. The order does not need to be settled formally on the

Michigan agencies, but you should cc their counsel or at least run it by them before you send it by email to chambers so they can --

MR. OLSHIN: Yes, Your Honor.

THE COURT: -- make sure it's consistent with my ruling.

Okay. I would appreciate, I guess, the following:

If -- if -- well, I would like to know either way whether either or both of the Michigan defendants do file a petition for cert. If they don't, someone should schedule a pretrial conference so I could focus on what -- what is the next step in this litigation. If they do, then I'll at least know sort of what the timing is.

MR. OLSHIN: Yes, Your Honor. We'll make arrangements to make those notifications.

THE COURT: Okay. Thank you.

MR. RATERINK: Thank you, Your Honor.

THE COURT: Thanks.

MS. PRZEKOP-SHAW: Thank you.

THE COURT: Thanks.

And, again, I -- I -- it's beating a dead horse. I -- I still am amenable to so ordering a stip along the lines that, you know, we've been talking about.

MR. CAMPANARIO: Your Honor, the last item on the agenda is a motion to dismiss by the defendants in an

adversary proceeding that was brought by CAI Distressed Debt Opportunity Master Fund Ltd and others. Davis Polk represents the defendants in that adversary proceeding --

THE COURT: Okay.

MR. CAMPANARIO: -- so I'll turn it over to them.

THE COURT: That's fine.

MR. KAMINETZSKY: Good morning, Your Honor. Benjamin Kaminetzsky of Davis, Polk and Wardwell for the defendants.

As the Court is aware we are here today on the defendants' motion to dismiss with prejudice plaintiffs' adversary proceeding, which basically asks this Court to revisit and completely rewrite the distribution scheme for general unsecured creditors that is set forth in the confirmation order, the plan of reorganization, the master distribution agreement and the operating agreement, a distribution scheme that, by plaintiffs' own admission in their complaint, was heavily negotiated and approved by the Court.

Now plaintiffs ask Your Honor to rewrite these documents in the context of one of the most brutal and hotly contested bankruptcy cases in recent history because, quite frankly, the plain language of these documents will not provide them with the recovery that they seek.

If I could -- it might just be easier and quicker

if I could just hand up to Your Honor -- I made a little booklet with just excerpts of the relevant documents. There's nothing more than that, just so Your Honor doesn't have to flip through multiple hundred-page documents. It can just follow along. Would that be okay?

THE COURT: Well, if you've -- you know, have you given a copy to the other side?

MR. KAMINETZSKY: Yeah. Here you go. And, again, it's just --

THE COURT: All right.

MR. KAMINETZSKY: -- the relevant pages that I'm talking about.

THE COURT: All right.

MR. KAMINETZSKY: At bottom, Your Honor, this is a case -- simple case summarized clearly and succinctly in plaintiffs' complaint at paragraph 54, and this is what the -- I mean, I couldn't have said it better myself -- this is what the complaint says: “The distribution of DAP stock to DAL members in exchange for those members’ DAL interests constitutes a distribution within the meaning of the Modified Plan, the MDA and the Operating Agreement."

So, if under the terms of the documents plaintiffs cite -- the modified plan, the MDA and the operating agreement -- these exchanges involved "qualifying distributions," we may be on the hook and this lawsuit can

continue. If --

THE COURT: Well, where -- where does the phrase "qualifying distributions" come from? That's not anywhere in the documents, right?

MR. KAMINETZSKY: No. Distributions. You're right.

THE COURT: Okay.

MR. KAMINETZSKY: I'm just saying because “distributions” is -- is a term that we have to talk about what it means.

THE COURT: Okay.

MR. KAMINETZSKY: But you're right. If it's “distributions,” then we're on the hook. If they're not, then the complaint must be dismissed.

The only dispute here is whether the exchange transaction constitutes a "distribution." For the purposes of this motion, there's no facts in dispute. So what was the transaction at issue? Very briefly, as plaintiffs' complaint explains, the DIP lenders set up an entity called DIP Holdco III, LLC, for the purpose of acquiring Old Delphi's assets. In the modified plan, the term "Company Buyer" is defined as DIP Holdco III. That's important.

DIP Holdco III, LLC later became DIP Holdco, LLP and then changed its name to Delphi Automotive, LLP, referred to in the complaint and in the briefing as DAL. As

the name suggests, the L part, this was an LLP, a partnership, and the partners held membership interests in DAL.

Now, the entity, DAL, wanted to conduct an IPO, but this raised a problem. Generally, partnerships don't go public, corporations do. And as every corporate lawyer knows, the simple way to go public is to establish a shell corporation that will exchange its shares for the partners' membership units, and that's what happened here. DAL set up a shell corp company called Delphi Automotive, PLC, referred in the complaint as DAP, and DAP exchanged its shares for the partners' membership units of DAL.

As a result, the partners who used to own membership units in DAL now owned shares of DAP, a company who, in turn, owned the membership units. DAP was then able to go public and the old partners of DAL, now shareholders of DAP, could sell their shares in an IPO.

I hope that's clear. I could --

THE COURT: What happened to the interests in the -- in DAL?

MR. KAMINETZSKY: They just -- they're held by DAP. It's pretty -- it's --

THE COURT: So it's an exchange, right?

MR. KAMINETZSKY: It -- perfectly -- exchanged. Suppose Davis Polk wanted to go public --

THE COURT: So -- so the interest holders in DAL got shares of DAP --

MR. KAMINETZSKY: That's it.

THE COURT: -- in place of the shares that they had in DAL?

MR. KAMINETZSKY: Right. It was basically --

THE COURT: So -- so isn't the -- I mean, so when you cut through it, the issue is whether that constitutes a "distribution," right?

MR. KAMINETZSKY: Well, there's three -- yeah. I mean, we're cutting through -- exactly. I mean, that's one of the three ways that they lose is that simply it wasn't a distribution. A distribution, Your Honor, we all know -- we were -- you, me, Mr. Johnston, we're all partners in a law firm. So it's the same thing. A distribution occurs when Davis Polk, Paul Weiss, whomever, has a million dollars and they decide, okay, let's distribute it to the partners.

THE COURT: Well, the plan doesn't say cash.

MR. KAMINETZSKY: What? No. Let's say Davis Polk wanted to distribute, I don't know, eraser boards.

THE COURT: Right.

MR. KAMINETZSKY: They would -- they would then give -- take that and give it to the partners. How do you know that happened, because the day before the distribution there was a million dollars on their balance sheet. The day

after the distribution there's no longer a million dollars of cash, securities, whatever on their balance sheet because it's now in the partners' pockets.

What happened here not a dime, a dime of DAL or a penny went to the partners. Nothing was distributed. What happened was, as Your Honor said, was there was just an exchange of shares. The balance sheet of DAL didn't change at all. Not one penny went from DAL to the partners' pockets, nothing. To the extent that anyone did anything, there was a DAL -- simply the membership -- the partners in DAL simply exchanged one equity interest -- what we'll call their membership interest in a partnership -- and got back the amount of equity, stock in DAP. That's it. That's what happens. It was an exchange.

And how do you know a distribution didn't occur, just cutting right through it as Your Honor said? Because if you look at the balance sheet the day before and the day after, nothing changed. Why did nothing change? Because DAL didn't give anybody anything.

So I guess if -- I -- what I want to do, Your Honor, if you could bear -- you know, kind of give me two minutes, I could walk you through the various documents. It's very quickly and just to show you what exactly was the distribution scheme in the plan and what wasn't the distribution scheme in the plan, and show you that under the

distribution scheme there had to be three -- there have to be three criteria met in order for it to count to the 7.2 billion-dollar-threshold for the unsecureds.

So if you will indulge -- indulge me, let's start with the terms of the modified plan. And the modified plan says very simply -- and, again, we have, if you want to just take a look, if you want to follow along in the excerpt book -- it says on Page 33, Section 5.3: "On the effective date, the disbursing agents shall establish a distribution account to hold the proceeds, if any, of the general unsecured MDA distribution." That's Section 5.3.

Now the general unsecured MDA distribution is a defined term and is defined on -- in Section 1.102 of the modified plan on Pages 14 and 50. And what does the word say:

"'General unsecured MDA distribution' means if and to the extent Company Buyer makes distributions to its members in accordance with the buy -- the Company Buyer Operating Agreement as described in Section 3.2.3 of the Master Disposition Agreement in excess of $7.2 billion, in an amount equal to," and then it sets forth a certain formula, up to $300 million.

Now there are two documents listed in this plan definition in black and white, but before we look at those two documents, which is the operating agreement and the MDA,

let me quickly note something that Your Honor's already picked up on. We already know -- just by reading the definition we already know two things:

One, for plaintiffs to be entitled to relief the distribution must have been made by the "company buyer" which is a defined term; and two, to count to the threshold -- the 7.2 billion-dollar-threshold, a distribution must be made.

If either or if certainly both of these criteria were not met, if the alleged distributions were not made by the company buyer or if there was no distribution at all, plaintiffs lose. Please hold this thought because we're just getting started.

Now let's look at the two agreements referenced in the modified plan's definition of “general unsecured MDA distribution.”

So, the relevant portion of Section 3.2.3 of the MDA is on Page 40 and states, if you go to the tab that says, MDA, it's right there and I'm going to read it slowly:

"To the extent payable following the closing, the Company Buyer" -- again, defined term -- shall pay to the disbursement agent amounts payable to the unsecured creditors of Delphi pursuant to the plan of organization and the Company Buyer Operator agreement for distribution to such unsecured creditors subject to the terms, conditions

and limits set forth in the plan of reorganization and the operating agreement."

Again, "subject to the terms, conditions and limits set forth in the plan of reorganization and such operating agreement."

Please note that the -- that the words are very clear and precise. The company buyer, which both parties agree refers to DAL, the partnership, has to pay the general unsecured creditors only if the distributions were made pursuant to both the modified plan and the operating agreement. And just in case that language wasn't clear enough, the end -- the MDA -- the same paragraph emphasizes that any obligation to the unsecureds is subject to the terms, conditions and limits set forth in the plan of reorganization and such operating agreement.

Now let's look finally at the operating agreement, which both the modified plan and the MDA specifically reference. We'll look at Section 5.6 entitled, payments pursuant to master distribution agreement. It states:

"In accordance with Section" -- and, again, if you want to just follow along in the -- in the booklet it's under operating agreement.

"In accordance with Section 3.23 of the MDA" -- that's the section we just looked at, Your Honor -- "if the asset purchase is consummated pursuant to the plan of

reorganization once an aggregate of 7.2 billion has been paid as capital d “Distributions” to the holders pursuant to this agreement, the company shall pay an amount," and then it's based on the formula up to $300 million.

And Section 1.1 on Page 4 contains the definition of capital d “Distributions.” And here we go. “Distributions” means:

"Each distribution, after the effective date, made by the company to a member, whether in cash, property, or securities of the company, pursuant to or in respect of Article 5 or Article 10."

So, by simply reading the words of these three documents, in order to be a qualifying “distribution” that would count to the 7.2 billion threshold, the transaction must be three things:

One, a distribution of cash or property;

Two, made by the Company Buyer, C.B -- that's DAL to its members; and

Three, made pursuant to Article 5 or Article 10 of the operating agreement.

You need to satisfy all three criteria to be a qualifying distribution or to be a distribution. And as detailed in your -- in our papers, Your Honor, the exchanges at issue were, on its face, the Holy Roman Empire of distributions. They were not distributions. They were not

made by DAL, and they were not made pursuant to Article 5 or Article 10 of the operating agreement. Plaintiffs are literally zero for three.

So let's -- we've already touched on this, but let's go -- talk about distributions.

Company buyer is a partnership, okay, and as we talked about a -- we know how partners distribute cash or other property. Is that what happened here? How much cash or property was distributed? The answer is nothing. On the day of the transaction the partners simply exchanged their membership units in DAL for equity in DAP. Not a single cent of DAL cash, property was distributed to the partners.

So returning to what we talked about, the balance sheet was completely unchanged. Now to a corporate lawyer and under the law, the difference between a distribution of assets and an exchange of shares is both clear and vast. And if you take a look at the example of the I -- the Internal Revenue Code set forth on Page 4 or 5 -- 4 and 5 of our reply brief it explains this in a very understandable way.

Under the tax code a distribution by a partnership is taxable -- is a taxable event, unfortunately for me, while the exchange of equity in a partnership for shares in a corporation is not taxable. Why? The case law says because it was a change in form, "not in substance." And

in an economic sense, there was a mere change in the form of ownership. A change in form is exactly what we're talking about now. It's as if Davis Polk, LLP set up a company called Davis Polk, Inc. and the partners exchanged shares for Davis Polk, LLP for Davis Polk, Inc.

So what do plaintiffs say? How can they say a distribution occurred when not a single penny was distributed? They say, yes, the modified plan, the MDA and the operating agreement used the term "distribution," but what those documents really, really mean -- or in plaintiffs' words on Page 12 of their brief "The obvious concern and purpose was to ensure that if those assets ultimately proved to be worth more than $7.2 billion unsecured creditors would be entitled to payment." That's what they say. I didn't make that up. They suggest that they are entitled to distributions based on the enterprise value of DAL.

Now, Your Honor, we both have seen plans that are -- when recover -- based on recoveries -- where recoveries are based on enterprise value or in plaintiffs' parlance on what the assets are worth. The problem for plaintiffs is, as we just saw from the documents, this is not such a plan. And as detailed in Page 10 to 12 of our reply brief, if for no -- some unknown reason the words of the modified plan itself is not strong enough evidence that the distribution -

- the recoveries were based on distributions and not what enter -- what the value of the assets were, the ultimate nail in plaintiffs' enterprise theory is the fact that in previous unconsummated plans in this case unsecured recovery was based on enterprise value.

And it gets even better, because the unsecured creditors committee, the UCC, of course understood the difference between the unconsummated plan which was based on enterprise value, and the later plans that were based on distributions. And, you know what, they objected vociferously. If you could just take a look on Pages 11 and 12 of our reply, this is from the unsecured creditors' objection. I'm quoting. Recoveries would "not be based on debtors' total enterprise value." That's from the UCC's objection, Paragraph 33.

Another one, "The value of the assets would be completely irrelevant to whether the general unsecured creditors receive any distribution." That was Paragraph 9.

The reorganized debtors "actually have to generate and distribute substantially more than 7.2 billion in actual cash returns to its equity before the unsecured creditors receive a penny, even a penny."

And my favorite quote, "Even if the value of reorganized debtors' membership interests were worth tens of billions of dollars in the future, general unsecured

creditors would not receive a penny unless reorganized debtors, among other things, distributed 7.2 billion of its members."

So to the -- to suggest that the modified plan intends to implement a distribution scheme similar to that of the unconsummated plan is completely contrary to the words, but also contrary to what everyone knew at the time. It is simply pure fantasy.

So if the Court finds that there was no distribution -- and there wasn't -- game over. The motion to dismiss must be granted.

Then we get to -- so that's -- they failed prong one, and if you fail any of the prongs you're out. So there was no distribution.

THE COURT: Well, there was no distribution by DAL.

MR. KAMINETZSKY: There was no distribution by DAL. Query, whether there was a distribution by anyone, but here we're getting to now the DAL point. So the question is -- okay. So now let's assume what Your Honor is saying. Remember, the definition of --

THE COURT: Well, you're -- you're saying there was no distribution by anyone because the IPO just established the value of the interests that -- that the former partners and now shareholders have. It wasn't -- it

wasn't a payment to them.

MR. KAMINETZSKY: Right. Well --

THE COURT: it just made their interest more easily tradable.

MR. KAMINETZSKY: Exactly, but it's -- but it --

THE COURT: And established a market price for it.

MR. KAMINETZSKY: Yeah. But it's even more than that, Your Honor, because, again, if you recall the definitions that we saw in the -- in the documents was that it has to be a distribution by the Company Buyer.

THE COURT: Well, no. That's the second point.

MR. KAMINETZSKY: Right.

THE COURT: I mean, I --

MR. KAMINETZSKY: I understand what you're --

THE COURT: You said it's not a distribution -- you spent most of the last ten minutes telling me why it wasn't a distribution -- why it wasn't by the company buyer, but the earlier point was that it's not a distribution, either because --

MR. KAMINETZSKY: It's just an exchange.

THE COURT: -- it just fixes the value of the interest. It doesn't -- it doesn't result in anyone receiving something in respect of that interest. It just makes that interest publicly tradable and --

MR. KAMINETZSKY: Right. And -- and one of the

requirements, as maybe we'll talk about a little later is that the exchange had to be exactly pro rata. In other words, no one was supposed to get more or less of the stuff, of the partnership. It was -- you know, it's literally what you said. It used to be called a membership unit in an LLP and now I'm getting the concomitant amount of equity in this shell company that -- whose only asset is the membership units.

So I guess it's hard to keep the three things separate, but now like segueing into the Company Buyer point, right. We already talked about how DAL didn't distribute anything to its members. Okay. But they say -- so to the extent anyone gave anything to anybody, it was DAP, not the Company Buyer, but DAP, the PLC, the company that did the exchange.

So what do plaintiffs say about that? In other words, the -- not in other words, the words of the plan say company buy -- the only thing that qualifies are distributions by Company Buyer. Not a dime left the Company Buyer. To the extent anyone gave anything to anybody it was the DAP giving these shares in a corporation whose only asset was what you already had anyway.

So what do they say about that? They say, well, the fact that it says Company Buyer doesn't really mean it has to be just Company Buyer. And they say the fact that it

was DAP and not DAL should be ignored because DAL and DAP are affiliates. And then they throw in like the alter ego and say that they should all be considered and collapsed into one. And then they throw in some what-ifs and a parade of horribles to suggest that the Company Buyer should be -- requirement should be ignored because theoretically DAL could funnel distributions through an affiliate and, therefore, avoid their obligations under the modified plan, something that never happened.

I could say a lot about this, but let me limit myself to two points because I think Your Honor has it.

First, the exchange at issue was not some sort of clever policy -- plot cooked up to re-route distributions to a dummy affiliate. These precise transactions, these pre-IPO transactions, including the creation of DAP, was explicitly and specifically laid out and contemplated in the controlling documents.

If you look, Your Honor, at Section 14.13 of the operating agreement it's entitled, Further Action, Initial Public Offering, and talks about setting up an entity called, Issuer, and describes how DAL members will contribute their "respective membership interest to a newly formed corporation, i.e. the Issuer, in exchange for equity in the Issuer." This is exactly the transaction that happened, that was alleged in the complaint.

And just to state the obvious, just the modified plan could have been based on enterprise value, the definition of "distribution" could have included distributions by the Issuer, but it doesn't.

And to -- for the plaintiffs to suggest that the Court should rewrite the controlling documents because Delphi did something that was always contemplated and set forth in black and white in Section 14.13 of the operating agreement just so it could get paid is unsupportable.

THE COURT: Well, it does -- it does say here that this -- well, the -- unless I'm misreading this, that the "common equity securities of the Issuer shall reflect the residual interests of the members pursuant to Section 5.1(a)(iv)."

MR. KAMINETZSKY: Right. That --

THE COURT: So there --

MR. KAMINETZSKY: -- proves the point we were just talking about. That means that -- what that means, what that's saying is exactly what we -- the dialogue we just had two seconds ago is that that means that there -- no one should be gaining or losing, getting more or less than what they -- what they had before. In other words --

THE COURT: Well, but -- but I think what you're suggesting, though, is that this is a separate argument from the argument that you were making, which is that, in

essence, it's the same thing and there's not been a distribution, because here I think what you're saying is that by going through the Issuer the right to a distribution is cut off for all time.

So that, for example, if the -- if the Issuer sold its assets or, you know, and there was, under your definition, a distribution as opposed to just a -- you know, turning the interest into stock, the rights under the plan wouldn't -- would have been cut off.

MR. KAMINETZSKY: Yeah. You know, interesting question. It's just not -- it's interesting. What you're saying is that, so let's say the DAL does what -- a real distribution, but it has to get --

THE COURT: No. DAP does.

MR. KAMINETZSKY: Yeah. Well, DAP -- the only thing that it has to distribute -- it doesn't have anything other than holding the membership units of DAL. It's a shell that the only asset is just I'm -- the membership units. It's really just a shell corporation on top that's between the partners --

THE COURT: Well, if someone buys DAP's stock --

MR. KAMINETZSKY: Right. Yeah. I -- I don't -- I mean, again, it's not presented in these facts so I'm not sure we have to decide this, but it's not -- I mean, again, the words "Company Buyer" are pretty clear.

And, Your Honor, the point here is -- the only point I'm trying to make here --

THE COURT: But what I'm saying is I think that -- that if the Company Buyer changes its stripes and becomes, you know, super Company Buyer --

MR. KAMINETZSKY: Company Buyer, Inc.

THE COURT: Yeah, or company -- yeah. Company Buyer, Inc, or -- or, you know, Company Buyer LLP II and gets distributed all of the assets of -- of the original Company Buyer, it would seem to me that that would either be an amendment to this operating agreement that would be precluded from -- by the confirmation order from cutting off the right to up to 300 million, or it would have to be done as explicitly recognized by this Section 14.3 where it would reflect the residual interests which I think would -- are impressed with this right to up to 300 million.

MR. KAMINETZSKY: Right. So that -- that's what happened here. I mean, it's what -- the reason why we're not confronted with your scenario, Your Honor, is because what they're suing us for is precisely what we did pursuant to 14.13 of the operating agreement. We did -- you know, look what it's written. It's called Further Action: IPO. We wanted to do the IPO that we always wanted to do and we did it precisely according to 14.13.

And it could have been the company -- in other

words, the plan of reorganization could have said if you do distributions or if you do an IPO they get paid. It didn't say that.

THE COURT: Well, in other words you're -- you're saying that the two or three horrible hypotheticals that are raised in the objection to the motion to dismiss really -- that -- that your arguments wouldn't apply to those hypotheticals because it's a -- those are situations that weren't contemplated by the -- by the parties.

MR. KAMINETZSKY: I -- I don't -- I'm not able to speak to that. What I'm saying is that I -- I -- again, it's not enough to defeat the plain words of a court order and documents by saying possibly someone could do something untoward. They're saying that what happened here is a distribution and clearly it wasn't. If -- if --

THE COURT: Okay. All right.

MR. KAMINETZSKY: -- in some future -- in some future time --

THE COURT: That's fine.

MR. KAMINETZSKY: -- we do something that we haven't done and they want to sue us again for that, I guess that will be for another day. But, again, you know, they're not saying we did any of that. They're saying we did the IPO and that IPO, that exchange transaction, is a "distribution" by the Company Buyer; and the answer is, it's

not, and the answer is, it was fully contemplated, and the plan could have said, if you do an IPO -- which we've seen in other plans -- and the value of the asset is worth X, we get paid.

THE COURT: Okay.

MR. KAMINETZSKY: It -- it just didn't.

THE COURT: All right.

MR. KAMINETZSKY: Okay.

If we could just -- if we could just now go on to the final point, and this, I think, is just the -- quite frankly, the -- just to review. So we have -- we don't have a distribution and we don't have it by the Company Buyer.

THE COURT: When you say we don't have a distribution, at this -- at this level you're saying we don't even have a lower case distribution.

MR. KAMINETZSKY: Yeah. We don't have a lower case distribution, capital distribution, subscript of D --

THE COURT: Well, no. Let's just leave it at lower case --

MR. KAMINETZSKY: Right.

THE COURT: -- because now you're going to make the capital D distribution argument, right?

MR. KAMINETZSKY: Yeah. I think they're going to make it. But, basically, what they're saying is that the third prong -- so we needed Company Buyer. We needed

distribution. No. No. And now it had to be pursuant to Article 5 and 10 of the operating agreement.

Now plaintiffs also lose for the third time because what happened here wasn't pursuant to Article 5 and Article 10 of the distribution agreement. So there's no dispute that Article 10 -- sorry -- of the operating agreement. So there's no dispute that Article 10 doesn't apply. That leaves Article 5 and as -- as I just explained, though, Section 14.13, that's Article 14 of the operating agreement contemplates the very type of exchanges DAP carried out with DAL members. So Article 5 doesn't apply.

So what do plaintiffs say in response to the clear requirements in the operating agreement that only distributions under Article 5 or 10 count? Well, after spending a page telling the Court how various online dictionaries define the word distribution, and perhaps my favorite sentence in plaintiffs' brief, they say on Page 12, and I'm quoting:

"To be sure, both the modified plan and the MDA do make reference to the operating agreement. That reference, however, does not magically incorporate into the modified plan the terms of the operating agreement."

Let me say that again:

"To be sure, both the modified plan and the MDA do make reference to the operating agreement. That reference,

however, does not magically incorporate into the modified plan the terms of the operating agreement."

Yes, it does. When a document says in "accordance with, pursuant to, and subject to the terms, conditions and limits as set forth in," abracadabra aside, magically incorporate is precisely what the words do. What else do they do?

Now plaintiffs also suggest that because a pre-IPO transaction under Article 14 had to be done on the same pro-rata basis as Article 5 distribution, the words in the operating agreement that read, "pursuant to Article 5 or Article 10" should nevertheless be read pursuant to Article 5, Article 10 or Article 14. Again, the prospect of an IPO was detailed in the documents and the definition of qualifying distribution could have included an IPO, but it doesn't.

So with nowhere else to go what do plaintiffs do? They implore the Court to simply ignore the operating agreement, pretend it doesn't exist, throw it away. Well, why? They have two suggestions:

First, they suggest that the terms of the modified plan and the operating agreement conflict. No, they don't. They can be -- they are and can be perfectly harmonized. Happy to go through it again, but at this point Your Honor is probably sick of looking at this language. Where is the

conflict? The case law is clear that even when you're dealing with private contracts, not court-approved orders, you don't look for conflicts. You try to harmonize.

THE COURT: But can I -- can I cut through this a little bit?

MR. KAMINETZSKY: Yeah.

THE COURT: It seems to me that -- well, you haven't addressed the payments to GM and the PBGC. You've so far just been focusing on -- on the IPO.

MR. KAMINETZSKY: Yeah, because they don't -- I'm sorry.

THE COURT: But -- but as far as that is concerned, I think that this capital D argument really is just a restatement of the argument that the IPO wasn't a distribution, lowercase d.

MR. KAMINETZSKY: Yeah. Again, there's --

THE COURT: But it --

MR. KAMINETZSKY: -- two things to say --

THE COURT: But it --

MR. KAMINETZSKY: -- one is that, yeah. A distribution is a word that has meaning and it's not a distribution no matter -- again, look at their definitions of distribution from the Webster dictionary and from Flags. It means --

THE COURT: Right.

MR. KAMINETZSKY: -- somebody gives stuff to someone else.

THE COURT: But on the -- on the other hand I -- it seems to me that there's only one way that there are actual distributions made under this operating agreement and that is either through Article 5 or Article 10 --

MR. KAMINETZSKY: Right.

THE COURT: -- on dissolution, or if you amend the agreement. You get the consent of the parties to amend the agreement.

MR. KAMINETZSKY: Right.

THE COURT: So it seems to me given that the order says you're not allowed to amend the agreement to get around the deal, the -- all the real distributions here are under Article 5, right?

MR. KAMINETZSKY: Well, no. They --

THE COURT: Even -- even the GM and PBGC distributions are -- are under Article 5 because they're either under Article 5 or there's been an amendment to the agreement.

MR. KAMINETZSKY: No, because, Your Honor, let me say two things. The first thing is that the GM and PBGC distributions don't matter because even they admit it doesn't get them to the 7.2 --

THE COURT: No. I -- I understand that.

MR. KAMINETZSKY: But, no. See, that would be fine, but they -- if there wasn't Article 12 and Article 12 of the operating agreement -- see, what Article 5 talks about these pro rata distributions -- and we could talk about it. I just don't know if Your Honor wants to spend a lot of time on it because it doesn't matter because they admit that the only -- that they only win or they only survive if the exchange offer --

THE COURT: Well, Article 12 requires additional consent, though, right? So you're, in essence, amending the agreement.

MR. KAMINETZSKY: Let me -- let me take a look at it.

THE COURT: And you're saying that the distribution went to GM and PBGC under Article 12, but that required an amendment. So then you run afoul of the order.

MR. KAMINETZSKY: No. No. No. I'm sorry. 12.2.

THE COURT: Right. Okay. Okay. Right.

MR. KAMINETZSKY: Okay. So it says:

"In addition to the approval of the board of managers, the company shall take -- shall not take directly or indirectly any of the action listed below nor permit any of the subsidiaries to do so directly or indirectly without consent of the majority initial class A holders."

So that -- that -- my understanding if that's who

we got -- we got consent. I mean, that's not the unsecureds. That's -- and then, B, if you look -- just flip the page, for so as long as the initial Class A holders own at least ten percent -- which we did -- of the Class A membership interest, then we could take out GM and the PBGC.

So these -- these -- these distributions, the ones that, you know, they're saying were Article 5 distributions were specifically not Article 5 distributions. They weren't pro rata distributions. They were distributions pursuant to Article 12, which is not 5 and not 10, but is something else.

THE COURT: But this provision isn't -- isn't one that provides for a distribution. It just -- it provides for a --

MR. KAMINETZSKY: Redeem, purchase or otherwise acquire for value any membership interests, redeems them.

THE COURT: But you -- you have to get the consent to do that.

MR. KAMINETZSKY: We -- the consent of whom, Your Honor? Look -- let's flip back.

THE COURT: The other members.

MR. KAMINETZSKY: No.

THE COURT: The holders, the Class A holders.

MR. KAMINETZSKY: The majority of initial Class A holders.

THE COURT: Right. I know. The committee didn't bargain for their consent right here.

MR. KAMINETZSKY: Right.

THE COURT: But --

MR. KAMINETZSKY: In other words, this document authorizes to do exactly what we did under not Article 5, not Article 10, but Article 12. So that's -- that just doesn't count because we saw the operating to be a distribution. It has to be pursuant to Article 5 or Article 10.

(Pause)

THE COURT: Well, I guess the question I have there is -- so you're saying that the available cash available for distribution to the members under Section 5.1(a) now doesn't include -- now has this tax on it, in essence, under 12.2(a)?

MR. KAMINETZSKY: Yes, or -- or said another way, that what we have to -- what counts towards the 7.2 billion-dollar-threshold are distributions as defined here and distributions as defined here are only distributions under Article 5 and Article 10 --

THE COURT: Well, all right. But 5.1 says all available cash available for distribution to the members may be distributed to the extent approved by the board of managers in accordance --

MR. KAMINETZSKY: May be distributed.

THE COURT: -- with the applicable provisions of this Article 5.

MR. KAMINETZSKY: Yeah. May be distributed under --

THE COURT: Right.

MR. KAMINETZSKY: -- Article 5 --

THE COURT: Right.

MR. KAMINETZSKY: -- but it may be distributed as specifically contemplated in Article 12.2, and the difference is Article 5 distributions count and Article 12 distributions do not count.

THE COURT: But why doesn't Article 12 just -- just modify the priorities here and these are available -- this is -- this is available cash, but you've modified the waterfall in 5.1(a) through the consent to the redemption in 12.2?

MR. KAMINETZSKY: Because that's what -- that's what -- yes. That's what the document does. I suppose that is because it was always contemplated that we would want a -- I'm making this up. I wasn't part of the -- but that we wanted to take GM and the PBGC out, so there was a specific provision addressed to that. And that was bargained for. I mean, these are documents that were court-ordered.

THE COURT: No. I understand. I'm just not --

I'm just telling you I -- I don't necessarily read there being more than two distributions sections in this agreement. The redemption section can easily be read as just simply modifying the order of priority that you make distributions.

MR. KAMINETZSKY: But it talks about -- it talks about redeem, purchase or otherwise acquire. It talks about taking them out.

THE COURT: Right.

MR. KAMINETZSKY: And that's what we did with --

THE COURT: Right.

MR. KAMINETZSKY: -- as we were authorized --

THE COURT: With cash, available cash.

MR. KAMINETZSKY: Right, which we were authorized to do.

THE COURT: Right.

MR. KAMINETZSKY: But --

THE COURT: Why is that inconsistent with 5.1(a)?

MR. KAMINETZSKY: Because it didn't have -- again, pursuant to Article 5 is -- Article 5 requires you when you do these distributions to do it according to the waterfall that Your Honor just talked about.

THE COURT: Except as modified by -- by the agreement.

MR. KAMINETZSKY: Right. So we --

THE COURT: By 12 -- by 12.2.

MR. KAMINETZSKY: Right. Exactly. So we didn't do it through Article 5. We did it through Article 12.

THE COURT: No. That -- that just sounds too cute to me. I mean, you could -- you could easily then say that -- I mean --

MR. KAMINETZSKY: You know, Your Honor, I disagree, but the good news is that's probably -- that -- if we win on the exchange offer --

THE COURT: Right.

MR. KAMINETZSKY: -- this case is over.

THE COURT: Okay.

MR. KAMINETZSKY: And then it's just -- you know, we could fight about the $2 billion, does it count or not count --

THE COURT: Right.

MR. KAMINETZSKY: -- if and when there's a further distribution.

THE COURT: Right. Okay.

MR. KAMINETZSKY: Let me just conclude and then -- because I think -- if Your Honor has got it --

THE COURT: All right.

MR. KAMINETZSKY: And, again, the last five minutes was not on the exchange offer. It was just on the 2 billion issue --

THE COURT: Right.

MR. KAMINETZSKY: -- not on the --

THE COURT: Right.

MR. KAMINETZSKY: -- not on the IPO.

THE COURT: Right.

MR. KAMINETZSKY: So what do they do about, again, the Article 5 and Article 10 problem, requirement with respect to the exchange offer.

THE COURT: Right.

MR. KAMINETZSKY: And they basically then are left to say that the Court should just basically throw out the operating agreement. They should ignore it and, why, because it was allegedly withheld from the public.

Once again, there's a lot to say, but the confirmation order approved the operating agreement and ordered it "binding in all respects upon all creditors and any holder of interest, whether known or unknown," and of course Your Honor had a copy of the agreement. So to suggest that the operating agreement is not binding is a direct impermissible collateral attack on the confirmation order.

And, of course, the sealing order makes clear that the unsecured creditors' committee had a copy of the operating agreement and the PBGC was on the creditors' committee and most of the plaintiffs are suing on behalf of

themselves and the PBGC -- I mean, to say that it was a secret document. . . .

But more than that, and here's really the kicker, there's no allegation in the complaint that they didn't have access to the terms of the operating agreement. In fact, the allegations are precisely the opposite. Paragraph 32 of the complaint says:

"The provisions of the agreements relevant -- agreement relevant to this lawsuit" -- referring to the operating agreement -- "are readily apparent through a review of related documents."

And Paragraph 35 says:

"On information and belief, all provisions of the operating agreement related to or affecting distributions to holders of general unsecured claims of the debtors were replicated faithfully in the LLP agreement in accordance with the requirements of the confirmation order."

And it was. And for good measure they attach a copy -- two copies of the LLP agreement to their complaint.

So for them to suggest -- they basically tried to do an amendment without looking. In the complaint they said they had the operating agreement or the relevant provisions, and in their brief they say it was secret and withheld and it shouldn't matter and -- and ignore it.

I guess I could go on, but I see you've had it

with me. So in the words of Winston Churchill, I'm just making the rubble bounce.

Just -- the fully contemplated exchange transaction in exchange for the fully contemplated IPO, and we saw it laid out in Section 14.13, were not distributions of assets. They were exchanges of equity. They were not made by the company -- company buyer, DAL. They were made by the issuer, DAP, and they were not made pursuant to Article 5 of the -- or 10 of the operating agreement. They were made pursuant to Article 14. Plaintiffs are zero for three and this isn't baseball. One strike is enough for their complaint to be dismissed.

Unless you have questions I'll sit down now and let Mr. Johnston --

THE COURT: Okay.

MR. KAMINETZSKY: -- comment.

THE COURT: Okay.

MR. JOHNSTON: Good morning, Your Honor. Jim Johnston of Dewey and LeBoeuf on behalf of the plaintiffs. This is my first time appearing before you.

THE COURT: Good morning.

MR. JOHNSTON: It's a pleasure to be here.

Your Honor, this is a case about entitlement to distributions under the plan of reorganization, the one that you confirmed two-and-a-half, almost three years ago. I

noted from the agenda that this is the seventy-fifth omnibus hearing and while that's impressive, I'm sure you had hoped to be rid of the matter by now.

I can tell you that my clients, all of whom are general unsecured creditors certainly hoped to have received what was promised to them under the plan, the relatively modest amount of $300 million, by now. Unfortunately, they haven't received a dime, or to use Mr. Kaminetzsky's phrase, a penny. The defendants have made it clear, in fact, that they do not intend to pay the 300 million now due under the plan. And so here we are. This is a case to compel performance of the plan, to compel performance and payment of that $300 million.

And it is a case that, first and foremost, hinges on the plain language and meaning of the plan. I'll agree with Mr. Kaminetzsky about that. As I'll explain, the plan, in no uncertain terms, provides that unsecured creditors are due payment when the "Company Buyer makes distributions to its members in excess of $7.2 billion." I'll explain why that's happened.

In an effort to dismiss this case now, you've heard the defendants say that the plan doesn’t really mean what it says. When you -- when the plan uses the term, “distributions,” it doesn't really mean all distributions, just those that fit within a narrower term, “Distributions,”

from an agreement that wasn't disclosed, that was secret, that was never on the public docket at the time of confirmation.

THE COURT: Well, can I interrupt you?

MR. JOHNSTON: Yes.

THE COURT: I can -- I can sort of see your argument on the redemptions to the PBGC and GM. I'm having a very hard time seeing your argument with regard to the IPO. The L -- the limited partnership interests in DAL, and I know there was a predecessor, but we're just referring to the DAL --

MR. JOHNSTON: Yes.

THE COURT: -- the limited partnership interests were not public, but they were transferable. You know, hedge fund Y could have bought some of those interests or all of them from the holders of those interests. That wouldn't be a distribution, would it? That wasn't -- that's not covered by this. That's a -- the assets of DAL are still there, right?

MR. JOHNSTON: Agreed. A transfer of the limited partnership interests --

THE COURT: Okay.

MR. JOHNSTON: -- while technically permitted under very limited circumstances as a practical matter didn't happen.

THE COURT: All right. So -- so instead of that, what happens is DAL, through the share transaction with DAP, goes public. So now the ownership interests are -- and I for the moment I'm accepting that you might be able to treat DAP and DAL as the same -- so the ownership interests are now public and there's a price put on them, right? That's the only difference, is that there's a market price put on them. There -- how is that a distribution?

MR. JOHNSTON: In a couple of ways, Your Honor.

We allege, and as you indicated you said that you would accept the allegation that for present purposes --

THE COURT: Well, just for the purpose of this hypothetical.

MR. JOHNSTON: Yes. For -- for present purposes --

THE COURT: Right.

MR. JOHNSTON: -- DAP is the same as DAL.

THE COURT: Right.

MR. JOHNSTON: DAP was owned and controlled by DAL. DAP's only directors were DAL's CEO and --

THE COURT: No. Just --

MR. JOHNSTON: -- general counsel.

THE COURT: -- for the purpose of this hypothetical --

MR. JOHNSTON: Uh-huh.

THE COURT: -- I'm accepting that. So -- but, again, how is -- how is -- the -- increasing the ability to monetize the ownership interests a distribution?

MR. JOHNSTON: The -- because there was a distribution of that DAP shares to DAL's members, a technical distribution. There was a transfer of that property and -- and that transfer of property actually was the essence of the transaction because it enabled the members of DAL to monetize their illiquid assets and to turn those illiquid assets into cash.

THE COURT: But so what? It doesn't have any -- it -- it's -- it's --

MR. JOHNSTON: Well --

THE COURT: The assets are still there.

MR. JOHNSTON: They're not there, though. I mean, keep in mind, Your Honor, that this was no ordinary IPO in which an Issuer raises capital for future operations and the like. The Issuer here didn't receive a dollar of proceeds. All of the IPO proceeds went directly to the company buyer's members. And what have they been doing since the IPO? All of the former member -- or yeah -- the former members of DAL, now the shareholders of DAP, they've been liquidating their investments.

To give you one example, Paulson and Company sold 20 million shares into the IPO. They made $453 million in

the IPO. Since then they've sold another four-and-a-half-million-dollars, making another -- or four-and-a-half-million shares making another 140 million. That's $700 million to one member of Company Buyer.

THE COURT: But the agreement did not provide that either -- that -- that this right, this contingent right to get up to $300 million, that it was triggered either by a -- you know, a public valuation of DAL or the monetization of DAL's members interests.

MR. JOHNSTON: No. The agreement provided for when the members of DAL took out of the company, received in respect of their ownership interests $7.2 million, then unsecured creditors were entitled to be paid.

THE COURT: Well --

MR. JOHNSTON: And what our --

THE COURT: -- it -- it doesn’t say that. I mean, you could provide that. You could -- you could easily have said in the agreement -- not you because you didn’t draft it.

MR. JOHNSTON: Correct.

THE COURT: But the creditors' committee could have -- could have provided that, you know, we get -- I haven't done the math -- like forty-five percent of every distribution -- not every distribution, every proceed of your membership interest in DAL, or any successor over and

above your pro rata share of $7.2 billion. It doesn't say that.

MR. JOHNSTON: No. But the plan provided that when the partners, the limited partners of this partnership, the Company Buyer, received distributions --

THE COURT: Right.

MR. JOHNSTON: -- which as a practical matter was the only way that they could get a return on their investment above a certain amount, then unsecured creditors got paid. What the transactions here have done have completely eliminated the -- that happening in the future.

And -- and I was going to end with this, but I think it's appropriate to turn to it. We have alleged, and I think it's appropriate, what this transaction has done has basically frustrated the purpose of the plan.

Even if these transactions somehow didn't qualify as a distribution within the meaning of the plan, under the allegations of the complaint the defendants have still breached the plan because the new structure put into place means that the 7.2 billion-dollar-threshold will be certainly much harder to satisfy and probably will never be satisfied, frustrating the purpose of the plan itself and the deal that was implemented in the plan.

THE COURT: Well --

MR. JOHNSTON: Under --

THE COURT: Can I interrupt you there?

MR. JOHNSTON: Uh-huh.

THE COURT: I mean, it -- certainly, the possibility of an IPO must have been in the minds of the people that prepared this. In fact, in -- and I -- it's expressly contemplated in Section 14 -- I'm sorry -- 4.13.

MR. KAMINETZSKY: 14.

THE COURT: I'm sorry. 14.13. So I -- and I -- you know, I went back and looked at the supplemental disclosure statement for the modified plan and it really just refers to the -- I think, unless you can point me to other language -- it really just refers back to this operating agreement. It doesn't say, for example, if you get money in any way, shape or form on account of your ownership interest above your pro rata share of 7.2 billion you're going to pay the rest on this sharing formula. It doesn't say that. I mean, I --

MR. JOHNSTON: I think --

THE COURT: -- I think if -- if people had relied on that, I would be much more inclined to deny this motion. But it just goes back to the operating agreement again.

MR. JOHNSTON: Well, two points on that.

One, the operating agreement absolutely did contemplate exactly what happened here. The insertion of this shell company between the partnership and the members

and then an IPO. And --

THE COURT: Right.

MR. JOHNSTON: -- as you observed earlier Section 14.13(b) provides for a distribution of the shares in exactly as was set forth in Article 5 of the operating agreement.

THE COURT: Right.

MR. JOHNSTON: That tells me that what happened here was a distribution and it was a distribution --

THE COURT: Well, can I ask you --

MR. JOHNSTON: -- under Article 5.

THE COURT: -- on that score -- and that's the only way I can conceivably, I think, accept your argument. The shares as distributed by DAP, I guess you could argue, were impressed with this right, right, the right to get up to $300 million? I guess that's the -- I mean, to me that's the only argument you could make here. And that -- so that, therefore, when you sell the shares in the future, you know, if your pro -- if your pro rata share of that adds up to more than $7.2 billion along with all the other distributions that are made not through share sales, arguably there is -- you know, there's a -- there's an obligation to pay that over. Although I don't know how you -- how you would possibly monitor that.

MR. JOHNSTON: It's not a matter of selling shares

in the future. It's -- they -- they got cash equivalent by virtue of these NYSE traded shares that the operating agreement itself says has to go out through the Article 5 waterfall.

But I --

THE COURT: So you're saying --

MR. JOHNSTON: -- I did want to refer --

THE COURT: -- the shares themselves have to go out that way?

MR. JOHNSTON: No. The shares -- the shares reflect the Article 5 distributions and -- and they say the -- at first you have to give preferred securities with preferences reflecting the amount of the distributions set forth in Sections 5.1(a)(1) through --

THE COURT: But how do you -- how do you -- maybe I -- as a practical matter how do you calculate that? Are you -- I mean, it would seem to me that --

MR. JOHNSTON: You --

THE COURT: -- if the new shares are issued they're issued pursuant to Section -- let's just say they're stamped with 5.1(a)(iv), okay. They're stamped with that -- that burden on them, okay. So then what? How does -- how do you get to your 300 million at that point?

MR. JOHNSTON: It -- it -- the 300 million is satisfied because --

THE COURT: No, but who -- who pays it? How does it get paid?

MR. JOHNSTON: DAL or DAP, but --

THE COURT: Out of its capital?

MR. JOHNSTON: Out of -- out of -- yes, because what DAL has done is it's distributed property with a market value of $22 a share aggregate $7.2 billion value that the market put on it to its members who can then go do what they wish with it. So it's not a question of going out and tracking down individual members who say, gee, did you sell on X and Y date, give us, you know, your share of the obligation to pay the $300 million.

I -- I did want to return, Your Honor to --

THE COURT: Well, but I guess the --

MR. JOHNSTON: The distribution happened --

THE COURT: Okay.

MR. JOHNSTON: -- upon the --

THE COURT: All right.

MR. JOHNSTON: -- transaction. All of this was simultaneous. Exchange, IPO, members got publicly traded market valued shares.

I did want to go back to the idea that -- that somehow the operating agreement itself is the be all end all of the question here as opposed to the plan. I want to say, you know, first, it's an odd contention given what happened

in the case.

What we've heard is that a fundamental limitation on the unsecured creditors only right to payment under the plan isn't contained in the plan. It's not contained in the confirmation order. It's not contained in the master distribution agreement that was actually filed with the plan, but it's in this operating agreement that was only filed under seal, can't be found anywhere in the public record or the bankruptcy cases.

I think, Your Honor, coming into this as someone who wasn't there at the time that that can't be. This was the one provision of the plan that unsecured creditors cared about. It was so important that Your Honor specifically ordered in Paragraph 64(g) of the confirmation order that the rights to the MDA distribution couldn't be amended, modified or waived to reduce, eliminate or otherwise affect the distributions to unsecured creditors.

But we're supposed to believe that this allegedly critical limitation was buried in a non-public document that unsecured creditors never saw.

THE COURT: But it's -- it's -- it's in every provision. It's in every public provision.

MR. JOHNSTON: Well, not to the extent that Mr. Kaminetzsky says. It simply says “in accordance with the Operating Agreement.” And what happened here? These --

THE COURT: Well, it says --
MR. JOHNSTON: -- exchange transactions --
THE COURT: -- subject to the terms and conditions --
MR. JOHNSTON: -- were in accordance --
THE COURT: It says “subject to the terms, conditions and limits --
MR. JOHNSTON: Yes.
THE COURT: -- set forth in the POR and the Company Operating Agreement.”
MR. JOHNSTON: Yes. And -- and --
THE COURT: And there's no dispute that the people that negotiated this deal had access to the operating agreement, right?
MR. JOHNSTON: I -- I assume that that's the case. I assume that that's the case, but it never found its way --
THE COURT: And no one raised -- no one objected to confirmation or to the supplemental disclosure statement and said, “wait a minute, this is -- I want to see it. I'm not going to rely just on the committee. I want to see it myself and know what's happening.”
MR. JOHNSTON: On -- on what grounds would they have had reasons to do so? The plan --
THE COURT: Because they want to see the -- they want to see the agreement.

MR. JOHNSTON: But the plan on its face is crystal clear. It just says distributions to members in amounts above $7.2 billion. There -- there was no disclosure that the operating agreement limited creditor rights. Creditors had absolutely no reason to seek it out.

THE COURT: Well, actually, I mean, the supplemental disclosure actually says to unsecured creditors: “pro rata share of deferred consideration under the master disposition agreement.”

MR. JOHNSTON: Well the master disposition agreement was disclosed.

THE COURT: And it refers to the -- it refers to this agreement, the operating agreement. So --

MR. JOHNSTON: Yes, but there's --

THE COURT: -- I mean, honestly --

MR. JOHNSTON: -- there's no --

THE COURT: -- if you're -- if you're doing your due diligence on this, you either -- you either trust in the committee's judgment or you say “I want to see it,” and I probably would have let them see it. At least they could have signed a confidentiality agreement and seen it, but no one wanted to see it.

MR. JOHNSTON: We -- we don’t know if anybody wanted to see it or not.

THE COURT: Well, I know because no one asked for

it.

MR. JOHNSTON: No. But once there's a sealing order in place in a bankruptcy court it's -- I'm -- you have far more experience than I do.

THE COURT: The sealing order contemplates the ability to sign a confidentiality agreement, even -- even if you -- even if you believe that the sealing order can't be -- can't be --

MR. JOHNSTON: I don't believe that's the case, Your Honor.

THE COURT: But that's -- but that -- look, I --

MR. JOHNSTON: I mean, there --

THE COURT: You're -- I -- you're not going to win on this argument. I'm sorry. It's not going to work.

MR. JOHNSTON: Okay. The -- again, if there was a general description that was misleading, this argument would work because then you would have conflicting documents, but you're led right back to the operating agreement.

Now you -- you make the argument that the operating agreement in two or three ways isn't as rigid as Mr. Kaminetzsky is saying and I -- I understand that in part. But if you don't have the operating agreement what do you -- what do you have? I mean, it's --

MR. JOHNSTON: You have the very --

THE COURT: I mean, you could basically say that -

- that it could be an enterprise value. It could be anything.

MR. JOHNSTON: Well, no. You have the plain common sense meaning of the plan, which is what creditors did --

THE COURT: All right.

MR. JOHNSTON: -- have access to.

THE COURT: Then if there is $7.2 billion of what?

MR. JOHNSTON: Are distributed to the members of DAL, then unsecured creditors become entitled to the sharing formula set forth --

THE COURT: Okay.

MR. JOHNSTON: -- in the --

THE COURT: And, again --

MR. JOHNSTON: -- definition of the plan --

THE COURT: -- distributed -- distributed -- distributed by whom, by DAL or by the public buying the shares that these people have in DAL? I think that's -- that's your real hurdle here.

MR. JOHNSTON: Well, and --

THE COURT: And that's a -- that's a very significant distinction.

MR. JOHNSTON: And --

THE COURT: And it's a -- it's such an obvious distinction I would have to assume the parties were aware of

it when they were negotiating this. It's one thing to say that we get this right, which you would normally get through a warrant or, you know, through some form of equity whenever the value -- you know, that we could monetize just like they're monetizing it, just like the owners are monetizing it, you know, a contingent value right or a warrant, if it's, you know, turned into -- into publicly tradable shares.

But to say a "distribution" is really a different -- I mean, who is making the distribution here? The only way, again, I -- I can see this argument, and I want to hear Mr. Kaminetzsky's response to it, is that "distribution" not only means that the entity in which your -- in which the investors owned an interest in pays them something, which is I think the normal definition of a distribution, which is -- you know, you get something from your limited partnership, in this case or your corporation. You get a dividend. You get a redemption. You get something directly from it.

But I think your argument is saying, well, that's -- you know, it's more than that. It's if they could ever monetize it in any way, including getting a greater fool to buy their interest in it, then you get a share of that. And there's so many ways to actually add that in, none of which were done here.

MR. JOHNSTON: And that --

THE COURT: You know, you get a right of first refusal. You get a warrant. You get an option. I mean, it's -- those are all things that -- that cover that second alternative as opposed to just a payment, a distribution by the -- you know, by the limited partnership.

MR. JOHNSTON: And -- and the second alternative is not our argument. The --

THE COURT: Well --

MR. JOHNSTON: -- argument here is that the distribution of --

THE COURT: Was getting the common shares.

MR. JOHNSTON: -- of the common shares --

THE COURT: All right.

MR. JOHNSTON: -- is a qualifying distribution under -- it -- it is a distribution that counts toward the $7.2 billion and --

THE COURT: And -- and why is that --

MR. JOHNSTON: -- it counts --

THE COURT: -- why is that a distribution?

MR. JOHNSTON: Because what the defendants here did was take the limited partnership interests, convert them into something that's essentially equivalent to cash, and distributed it to members who can then do what they wish with it.

THE COURT: Okay.

MR. JOHNSTON: That --

THE COURT: But why is that a distribution?

MR. JOHNSTON: Because it then enabled the members to realize the values of their interests --

THE COURT: But that's --

MR. JOHNSTON: -- which is the same as a --

THE COURT: But that's not a distribution in my mind. That's -- that's, again, selling your interest as opposed to getting something from -- I mean, DAL is still worth what it's worth, right? It's still --

MR. JOHNSTON: Yes.

THE COURT: It's still impressed with this -- this three -- up to three-hundred-million-dollar tax or interest that --

MR. JOHNSTON: Well, let me --

THE COURT: -- that your clients have along with all the other unsecured creditors. So if someone ever wants to sell DAL, then they'll get their money.

MR. JOHNSTON: But who is going to sell DAL?

THE COURT: Well, I don’t know.

MR. JOHNSTON: Do --

THE COURT: I mean, but it would seem to me that that's the question that the people should have been asking when they negotiated the deal.

MR. JOHNSTON: Let me -- let me drill down on

this. Under the pre-IPO structure, the individual members of DAL controlled DAL and they had the economic interest in receiving a return on their investment, right? Over time it stood to reason that those members would actually direct DAL to make distributions at appropriate times. That way they would recoup their investment. You saw that happen --

THE COURT: Right.

MR. JOHNSTON: -- with the distributions to GM and PBGC, some --

THE COURT: Right. I understand that.

MR. JOHNSTON: -- four-million-dollars went out the door.

THE COURT: Right. And I'm much more sympathetic to your arguments there than I am on this other point.

MR. JOHNSTON: And -- and that was the status when the plan was struck, the plan deal was struck.

Now what do we have? We have DAL controlled by a publicly owned holding company, DAP, from which there's no need for DAL to get distributions. DAP wholly owns DAL. All of DAL's financial results and balance sheets are rolled up into DAP for accounting and reporting purposes --

THE COURT: But why can't we --

MR. JOHNSTON: -- as -- as a --

THE COURT: Let me interrupt you. Why can't -- why can't this very easily be interpreted, and appropriately

interpreted, to say that the ownership interests in DAP are impressed with this up to three-hundred-million-dollar right, and whenever DAP makes a dividend or redemption or sells its assets or sells DAL's assets, then, you know, you keep totting those up and when they add up to 7.2 billion, along with any distributions that occurred before the IPO, then the 300 million kicks in?

MR. JOHNSTON: But -- but the point is -- is that how is DA -- how and why would DAP make a dividend?

THE COURT: Well, but -- but wait. You're -- you're -- I mean, you're buying the stock because you think it's worth something, right? At some point it's not just a shell game. You actually have to look at the value of the company.

MR. JOHNSTON: Which -- which is -- which is the point. The value of the company is all rolled up into this -- into DAL.

THE COURT: Well, I am assuming that the price that they paid for the stock included the calculation that this 300 million would have to get paid some day. I mean, that --

MR. JOHNSTON: Well --

THE COURT: -- that affects the price --

MR. JOHNSTON: That -- that raises an --

THE COURT: -- right?

MR. JOHNSTON: -- interesting point. What did the company say about the 300 million when they issued the shares? And this is in our complaint. When you look at the S1 that -- that accompanied the IPO, what do they say? They say that the "contingency of member distributions exceeding $7.2 billion is not considered probable of occurring." They said it's not going to happen.

THE COURT: Well, when? At what point --

MR. JOHNSTON: Ever --

THE COURT: -- in the future --

MR. JOHNSTON: Ever.

THE COURT: -- or -- or as part of this transaction?

MR. JOHNSTON: No. No. Ever.

THE COURT: Well --

MR. JOHNSTON: Their disclosure is that -- their disclosure is that it will never happen.

THE COURT: Well, but that doesn't --

MR. JOHNSTON: And --

THE COURT: I mean, the people who bought the stock may have a cause of action over that, but -- but you guys don't, do you?

MR. JOHNSTON: That -- we have a cause of action because what they've done is frustrate the fundamental purpose of --

THE COURT: Well --

MR. JOHNSTON: -- this plan provision.

THE COURT: All right.

MR. JOHNSTON: They -- they've done this transaction. At the same time they tell the market this contingency of future member distributions isn't going to happen. It's not going to happen and why is it not going to happen, because the new structure they've put in, for all intents and purposes, means that there will never be those distributions.

THE COURT: Well, but was there anything that -- that -- in the documents that precluded them from doing this structure? I mean, they -- in fact, it's specifically contemplated in 14.13.

MR. JOHNSTON: It's specifically contemplated in 14.13 and -- and as we argued, we believe that 14.13 then incorporates the distribution provisions and reaffirms our argument that what this was really was a distribution and it really was a distribution of material assets worth -- worth billions of dollars.

THE COURT: All right. Well, I guess that's -- to me that's the only issue. Is -- is whether that was -- that stock that the limited partners received was a distribution or simply a -- a non-material transformation of their ownership interests. And -- well, I guess I can see that

the stock itself might be impressed with this right of the unsecureds. It's hard for me to see how it's a distribution or that DAP -- I -- better yet, DAP is impressed with this right. It's hard for me to see how it's a distribution.

It -- it says that there's -- that you're supposed to get -- ignoring the preferred securities -- common equity securities of the issuer reflecting the residual interests of the members pursuant to Section 5.1(a)(4).

MR. JOHNSTON: And -- and before that preferred equity securities.

THE COURT: Right.

MR. JOHNSTON: Right.

THE COURT: Okay. So -- was it just common or was it preferred issued as part of the IPO? I thought it was just common.

MR. JOHNSTON: I will find that out.

THE COURT: But -- all right. Anyway, it's --

MR. JOHNSTON: I think it was just common.

THE COURT: I mean, it -- it does -- the other one -- okay. So -- so how -- how does that language make it a -- make the receipt of the shares an Article 5 distribution? Even though it does refer to Article 5, how does it make it a distribution as opposed to just saying you're getting -- you're getting your stock pursuant to the interest that's laid out in (a)(iv)?

MR. JOHNSTON: Well, the distribution is by virtue of the fact that this was DAL property, the shares of DAP. That's -- that's the allegation in the complaint. And --

THE COURT: But how --

MR. JOHNSTON: And then -- and then to defeat the technical argument that somehow it doesn't really count as a distribution unless it's a "Distribution" and then it has to be a "Distribution" only if it occurs under Article 5 or Article 10, what we read 14.13(b) as doing is saying that that distribution of property, which is contemplated under the operating agreement, has to adhere to Article 5. That's -- that's what this says.

I mean, Article 5 --

THE COURT: Well, it says they get --

MR. JOHNSTON: -- sets forth --

THE COURT: Well, actually, what it really says is they get -- they get the -- it gets distributed to them in the percentages in 5.1(a)(iv).

MR. JOHNSTON: Right, which -- which is exactly how distributions of property are made.

THE COURT: But 5.1(a) talks about distributions of available cash. 5.3 talks about distributions of assets other than cash. But how is -- how is this -- how is the issuance of the stock in return for the ownership interest distribution of property of -- of -- of DAL? It's not.

It's a substitution of the interests in DAL for another interest. It's not a distribution of DAL's property.

MR. JOHNSTON: When -- when you combine it with the instantaneous issuance of the public and sale of the public shares by the members, what it did was distributed DAL's property.

THE COURT: It didn't distribute DAL's property. It distributed the ownership interests. It just made it more -- it made it more -- it made it market -- it made it more marketable, but --

MR. JOHNSTON: Right.

THE COURT: I guess that's my problem with this. I mean, I -- it goes back to my original question. I don't see a conceptual or, you know, logical difference between selling an LLP interest and selling a stock interest. I do see that this language in the documents limits the unsecureds' ability to monetize the -- their contingent interests. But I think that's what it does --

MR. JOHNSTON: Well, and --

THE COURT: -- particularly when there are all these other ways that you can take care of that problem that aren't dealt with here.

MR. JOHNSTON: That --

THE COURT: And believe me, you know, I -- I would be flabbergasted if the issue of warrants or contingent

value rights or some appraisal mechanism wasn't raised. I mean, it's -- those are all extremely well known ways to deal with this type of problem.

MR. JOHNSTON: Well, Your Honor, that's one of the things that discovery in this case will show.

THE COURT: But --

MR. JOHNSTON: And -- and we have --

THE COURT: But why do I have to have discovery on it when the documents don't deal with this --

MR. JOHNSTON: We --

THE COURT: -- scenario? They don't -- they don't cover the ability to tag along with the equity. They only deal with the ability to get paid out of the LLP --

MR. JOHNSTON: Your Honor --

THE COURT: -- and, arguably, any successor.

MR. JOHNSTON: -- one -- one of the causes of action in our complaint is -- gets to precisely that subject and -- and that is that by virtue of this transaction the defendants have frustrated the purpose of the plan.

Now maybe discovery will show that everyone contemplated this and that warrants were asked for and rejected, that there was some other kind of instrument was on the table and wasn't -- and wasn't ultimately adopted and that everybody understood that if an IPO like this happened there wouldn't be a distribution and unsecured creditors

wouldn't have any rights.

Certainly, the public documents don't show that. Certainly, the record available to unsecured creditors at the time the plan was confirmed don't show that. Responding to one of Mr. Kaminetzsky's assertions earlier that our complaint says, well, yeah, everybody knew because the LLP agreement had similar provisions. The LLP agreement didn't come on the scene until after confirmation. It was --

THE COURT: Well, I think --

MR. JOHNSTON: -- the agreement that replaced the --

THE COURT: -- I mean --

MR. JOHNSTON: -- operating agreement.

THE COURT: I think the complaint really says that you have the documents now as opposed to then.

MR. JOHNSTON: Right.

THE COURT: So I -- I don't think it's an admission that you had the documents then rather than they're -- they're available now.

MR. JOHNSTON: And -- and if you look at Count III it alleges that:

"Defendants frustrated the rights of holders of general unsecured creditors of the debtors in violation of an implied covenant of good faith and fair dealing in the" --

THE COURT: But why is the --

MR. JOHNSTON: -- "modified plan."

THE COURT: But -- well, but I -- I don't -- I mean, if the language of the contract is clear, why is there any sort of implied covenant of good faith? The contract speaks for itself. You don't get to that.

MR. JOHNSTON: Well, which --

THE COURT: The --

MR. JOHNSTON: -- contract are we talking about? If we're talking about the plan --

THE COURT: You're talking about the --

MR. JOHNSTON: -- then the --

THE COURT: Oh, well, I -- okay. That's the argument -- that the issue I -- I told you you were going to lose on for sure --

MR. JOHNSTON: All right.

THE COURT: -- which is that something other than the operating agreement is going to govern here. I -- I just -- it's --

MR. JOHNSTON: All right. Well --

THE COURT: It's just not -- I mean, the very provision that deals with this -- let me just turn to it is 1.102 that says, you know, “in accordance with the Company Buyer Operating Agreement.” I mean, everyone knew there was a document there. And 3.2.3 of the MDA refers to the

"Company Operating Agreement."

So, you know, it -- that's -- that's where you look. That's the first place you go to.

MR. JOHNSTON: If you could see it.

THE COURT: Well, you could have -- no one asked to see it, and, you know, that's their problem, I guess.

MR. JOHNSTON: Let me turn briefly to the distributions to General Motors and PBGC and I --

THE COURT: Okay.

MR. JOHNSTON: -- I understand what Your Honor said earlier and, obviously, we agree. But I think that the fact of -- that the defendants are making the argument that four-and-a-half-billion-dollars distributed directly in cash by DAL to members doesn't count as a distribution to meet the plan threshold, I think, bears a fair amount on their arguments with respect to the other question because they -- they're trying to treat this as a game of --

THE COURT: Well --

MR. JOHNSTON: -- gotcha.

THE COURT: -- but let -- but let's assume I -- I think that at a minimum the agreement is ambiguous on this point, and maybe even go so far as to think that that's got to be a distribution. You're not close yet, right? There's -- there's a few billion dollars to go.

MR. JOHNSTON: There is a few billion dollars to

go.

THE COURT: Right.

MR. JOHNSTON: That's right. And -- and if Your Honor does not give us leave to amend to address any concerns you have in the complaint, if you say come back when there's another two, two-and-a-half-billion-dollars of distributions made, the problem we're going to be faced with is the practical realities -- and this goes to the breach of the covenant of good faith -- that the structure the defendants have put in place makes it highly unlikely that there will be future distributions and --

THE COURT: They're never going to make a dividend?

MR. JOHNSTON: They -- they have no reason to make a dividend. That's the point that I was making earlier.

DAP can store all the excess cash. It can make purchases directly. It can do deals. It can direct buyer to pay a -- a third party directly. There's -- and shareholders get the benefit of the enterprise value. They're getting the benefit of the flow to the stock. They -- it's -- the people who bought this stock are buying the enterprise value. They're not buying it for dividends. There's not going to be a dividend. There's -- there's no reason that any dividend would -- would be made in the future. And that goes to --

THE COURT: How do I know that? I mean, I -- I am assuming -- I mean, among other things, that's why this provision was in here, is that if there are distributions, redemption of stock, dividends. I mean, they -- they sell it, they sell the assets, they're just going to plow it back into the company as opposed to -- to giving some of that back to the shareholders?

MR. JOHNSTON: The shareholders who hold NYSE traded shares and are able to then realize the value, the appreciated value that way.

THE COURT: Well, okay.

MR. JOHNSTON: I think that's all I have, Your Honor.

THE COURT: Okay.

MR. JOHNSTON: Okay. Thank you.

THE COURT: Thanks.

MR. KAMINETZSKY: Can I speak very brief or --

THE COURT: Yeah. I mean, the issue I wanted you to address, although you can talk about other stuff, too, if you want, is what is your response to the argument that when the limited partners in DAL got their -- got the stock in DAP they got a -- that -- that stock was impressed with the requirement that once they receive value in excess of 7.2 billion that 300 million has to come out. So, in essence, the right was triggered at that point.

MR. KAMINETZSKY: A couple of things, Your Honor. One is it just -- I mean, you could say a cat is a dog and you can say a dog is a cat, but if you read -- forget the operating agreement, just read 1.102. It says “General Unsecured MDA Distribution means if and to the extent Company Buyer makes distributions to its member in accordance with the company" --

THE COURT: Right.

MR. KAMINETZSKY: -- the MDA and the buyer in excess of 7.2, the Company” -- and we've talked about this -- and I think the best way to think about this is there's a lot of case law on this. The Internal Revenue Code says there's two different things and they're treated very differently and everyone knows the difference if you're a corporate lawyer -- is that there's a distribution of assets and the way you know if the distribution occurred of assets of a partnership is you look at the balance sheet the day before and the day after. If it's changed, there must have been a distribution. If there's a negative it must have been a distribution.

Here, as Your Honor has said, nothing left DAL and what the -- what the IRS has found and there's lots of case law on this and it's cited in our brief, that all that an exchange is, it's just that. You had a membership unit and now you have a -- a stock. They didn't get a -- who --

there was a distribution by whoever bought their stock, by the underwriter or by the public shareholder.

Again, DAL didn't cash out or -- or do anything. That's -- I mean, that's the -- that's the answer is that you can twist and -- I mean, somehow plaintiffs are approaching this case like they have a constitutional right -- hedge funds have a constitutional right to a distribution and any document that says that they don't has to be rewritten.

And, Your Honor, this would maybe be a little bit interesting if -- two things, one is if there wasn't Section 14.13 that contemplated this very transaction, the pre-IPO exchange and the IPO. That would maybe be interesting. Hey, nobody thought of this. This was a surprise. But everyone thought of it. It wasn't a surprise and, as you said, the creditors committee didn't negotiate for -- for it.

Your Honor, I've been involved and Your Honor has been involved in plans that were based on enterprise value. Everyone knows how to draft such a plan. Dewey Ballantine does, Skadden does. I mean, you had really sophisticated lawyers. This would also be a little bit more interesting if there wasn't a previous plan in this case that was based on enterprise value, and when this plan came out the UCC went crazy. I read to you the quote saying, wait a second.

This is nuts. There could be tens of billions of dollars of enterprise value and we won't get a penny. Surprise. Guess what? There could be an IPO. There could be tens of billions of enter -- tens of billions of enterprise value and they don't get a penny because that's what the words say. I mean, it's -- it's hard -- it's -- you could turn this into an enterprise value plan, but I humbly suggest three years later is not the time to revisit very clear words in the plan.

The -- and just a couple of -- a couple of points. We're playing along with this idea and we put a footnote in our brief that this is like a contract dispute and, you know, we could pretend it's a contract dispute. But it -- you know, Your Honor, it's not a contract dispute, these were not private contracts and now we're coming to a court as a third party and saying what do these things -- help us, what does this mean. These are all documents approved pursuant to the Court order after a confirmation process, et cetera.

They -- and -- and the -- which goes to the point is, you know, they talk about Mr. Johnston said, you know, he wants discovery. I'm not sure whose discovery he's talking about. Your Honor approved these documents. They're “so ordered” by the Court. The plan specifically says the plan -- sorry. The confirmation order specifically

says that the operating agreement, the plan --

THE COURT: Well, if -- if -- if the -- if the documents were ambiguous then they would be entitled to discovery.

MR. KAMINETZSKY: Of who, of what Your Honor thought when --

THE COURT: No. The --

MR. KAMINETZSKY: -- you read the --

THE COURT: -- the parties who negotiated on them, what they were -- what they said and so forth.

MR. KAMINETZSKY: I'm not sure -- but -- okay. But there --

THE COURT: I mean, otherwise, how do I know what they mean?

MR. KAMINETZSKY: Well, because -- I mean, I guess --

THE COURT: I mean, it's not --

MR. KAMINETZSKY: Okay.

THE COURT: -- it's not enough just to say that they're there, because that doesn't -- that doesn't really answer the question. But I think I know what they mean, so --

MR. KAMINETZSKY: Okay.

THE COURT: -- it doesn't matter.

MR. KAMINETZSKY: But I'm not sure -- if -- it's -

- so the question would be what does “in accordance with” mean, what does “pursuant to” mean, and what does “subject to the terms and limitations” mean. I mean, that's the kind of discovery that they want to take. It doesn't -- it doesn't make any sense. The MDA says you get distributions if -- pursuant to, subject to and -- and subject to the terms and conditions and limits.

The other thing that I found surprising is that, you know, this idea that the operating agreement was secret or anything else. They bought into this deal and they've already admitted that for litigation purposes they were able to quickly figure out the terms of the operating agreement.

THE COURT: Well, these -- these particular plaintiffs, you're saying.

MR. KAMINETZSKY: Right.

THE COURT: Yeah.

MR. KAMINETZSKY: So, I mean, like in other words --

THE COURT: That's fair. I mean --

MR. KAMINETZSKY: I can't be their insurer -- if you have a document that -- if you have an instrument that says you're distribution is contingent on -- contingent on the terms of an operating agreement, you could either get the operating agreement or not. If you decide to buy it anyway without getting the operating agreement, that's --

I'm sorry, but that's your problem.

THE COURT: Right. That's all right. I mean, I was -- I was discussing the issue of those who were owners of unsecured claims before the modified plan was confirmed. I think it's a very different set of equities --

MR. KAMINETZSKY: Right.

THE COURT: -- afterwards.

MR. KAMINETZSKY: But the --

THE COURT: Although I'm not sympathetic to either group --

MR. KAMINETZSKY: Okay.

THE COURT: -- on this point, so.

MR. KAMINETZSKY: Well, our plaintiffs are -- actually like bought -- bought into this.

I just wanted to say one -- I think you -- Your Honor, you got it. I mean, the only way they get what they want is if you turn this into something that it wasn't, but -- and something that it was clearly and specifically and deliberately not because we had an enterprise plan and it was unconsummated, an enterprise value plan and then we had this.

The other thing I wanted to say and I think it's an important point is I -- I don't want to -- the PBGC and the GM issue, I just -- I want to clarify something. Available -- there's no obligation to use available cash to

-- pursuant to Article 5 and give it out. The board could do whatever it wants with available cash. It could use it to buy another company. It could use it for whatever. Here it shows to do the Article 12 redemption of the PBGC and --

THE COURT: I understand that, but --

MR. KAMINETZSKY: -- the GM.

THE COURT: -- on the other hand, it's not like they're -- I mean, they're -- they're doing it to make the payment to the investors, I mean, to the -- to the holders of interests in this entity. It's not like they're doing it to -- to buy a new plant. So it -- it just -- it -- this argument seems a little -- a little too cute to me.

MR. KAMINETZSKY: Okay.

THE COURT: I mean, you could -- you could-- I mean, you could say that, you know, if you get -- if you get the consent you could make a distribution that's not pro rata, but would be off like, you know, $100 and then it wouldn't be covered. I -- I just --

MR. KAMINETZSKY: Okay.

THE COURT: -- you know, it's --

MR. KAMINETZSKY: The good news is that's for another day as plaintiff has -- have indicated.

THE COURT: Right.

MR. KAMINETZSKY: The other thing that I just wanted to -- the part that I think just drives home the

point, the partnership, it just -- it's factually inaccurate. The partnership interest, the membership units, were traded as Your Honor said. They were traded frequently.

THE COURT: Right.

MR. KAMINETZSKY: Yes. The -- pursuant to the exchange offer they became shares in a corporation rather than -- but they were -- it just -- it --

THE COURT: Well, the only distinction is counsel is saying that rather than selling what they already had, i.e. limited partnership interests, what happens here is they got something new. But it seems to me that the something that they got that was new was simply a -- a reformulation of their interest as --

MR. KAMINETZSKY: Right.

THE COURT: -- opposed to a --

MR. KAMINETZSKY: And that's precisely what the IRS says; that all it is, it's an exchange. It's in form and not -- read the cases. As opposed to a distribution where you get something and you're taxed --

THE COURT: Right.

MR. KAMINETZSKY: -- this is just a swap of one -- and, Your Honor --

THE COURT: I mean, I -- and to be honest with you that's -- that's why I disagree with one of the prongs of

your argument, which is that now that it's DAP as opposed to DAL, you know, DAP can --

MR. KAMINETZSKY: Do whatever it wants.

THE COURT: -- do whatever it wants --

MR. KAMINETZSKY: Okay.

THE COURT: -- because I -- I think --

MR. KAMINETZSKY: I hear Your Honor loud and clear and so does the company.

The other point I wanted to make, if -- if they're right, then just think about it. So it's not the money that -- it just doesn't -- what we would have to do then, the exercise to get to the 7.2 wouldn't be how much third parties paid for the stocks. It would be the difference between what we could have sold the membership units for for what it's now worth because it's no longer membership units, but it's stock in a company. We would have some -- to go through some value -- because they're admitting that if it was just member -- I mean, that just -- it's insane, quite frankly. It doesn't --

THE COURT: I mean, that -- that seems right to me. I mean, what --

MR. KAMINETZSKY: Because --

THE COURT: -- what -- what's happened here is that the ownership interest has become more valuable than it was, but it was value -- it was worth something before then.

So it -- I don't see how you can actually put a value -- you know, it seems like a very weird process.

MR. KAMINETZSKY: And -- and, Your Honor, just --

MR. JOHNSTON: It enabled the members to cash out.

THE COURT: Well --

MR. JOHNSTON: -- which they couldn't cash --

THE COURT: -- but they could have cashed out --

MR. JOHNSTON: -- out before.

THE COURT: -- before for less. They could have cashed out -- I mean, I'm sure there was -- there were people there --

MR. JOHNSTON: There --

THE COURT: -- at the time who were willing to buy it for, I don't know, you know, $4 billion --

MR. JOHNSTON: There -- there's no --

THE COURT: -- because --

MR. JOHNSTON: -- evidence of that.

THE COURT: But --

MR. JOHNSTON: And we're on the --

THE COURT: -- I mean, come on.

MR. JOHNSTON: -- complaint --

THE COURT: The partnership interests were worth nothing and the -- and the stocks were worth everything? It just doesn't -- it's not common sense. I mean, and I think that really fails -- that just doesn't make sense, if that's

--

MR. KAMINETZSKY: And it's --

THE COURT: -- what you're saying.

MR. KAMINETZSKY: -- also factually inaccurate. In fact, they were traded and then it's this hypothetical exercise, and -- and that's just proof of what the IRS says and what the case law says is true. One -- there's a -- distributions are distributions and exchanges are exchanges. One's for real and taxable because you're getting stuff and one is an exchange of equity interests and it's not taxable and -- because you're not getting stuff.

And the proof in the pudding is how I started is that on day one DAL had $100. On day five DAL still had $100. Not a penny of that went -- was -- I say went -- was distributed to any of the members as required under the terms of the plan to qualify for the 7.2.

And that's all I have, Your Honor, unless there's anything else.

THE COURT: Okay. Okay. Just briefly.

MR. JOHNSTON: For the record, Your Honor, there's -- there's nothing in the record and Mr. Kaminetzsky doesn't know and I don't know when my clients acquired their claims. So --

THE COURT: All right. That's --

MR. JOHNSTON: So --

THE COURT: -- fair.

MR. JOHNSTON: So to -- to say that they bought into this risk and --

THE COURT: Right.

MR. JOHNSTON: -- and they bought into --

THE COURT: Well, certainly, anyone who did buy after confirmation, I suppose, or at least after the IPO would know about the issue. But as I said I don't -- I don't think for purposes of my analysis there's really a meaningful distinction.

MR. JOHNSTON: Understood. I --

THE COURT: It's obviously worse.

MR. JOHNSTON: -- I wanted to make that clear.

THE COURT: Right. No. That's fine.

MR. JOHNSTON: And -- and --

THE COURT: That's fine. And that's not -- that's obviously not a fact that's in the complaint. You don't state when -- your clients don't state when they bought it --

MR. JOHNSTON: Right.

THE COURT: -- so it's not -- it's not relevant to my analysis.

MR. JOHNSTON: And I -- I understand it's not a meaningful distinction in your mind as to --

THE COURT: Right.

MR. JOHNSTON: -- what was and was not disclosed at the time of confirmation with respect to the operating agreement. Our position is, in fact, it's -- it's pretty darn important and it wasn't out there --

THE COURT: Okay.

MR. JOHNSTON: -- in an unsealed way.

THE COURT: But, I guess, if that's the case I would have expected someone -- if it was that -- if it was that important to have -- to have objected and said, this isn't an adequate disclosure.

MR. JOHNSTON: It -- it's hard to get into the mind of -- of parties in interest back then. I mean, certainly --

THE COURT: Well, but, I mean, I --

MR. JOHNSTON: -- this happened very rapidly --

THE COURT: They certainly got --

MR. JOHNSTON: -- as I understand it.

THE COURT: -- disclosure of the public documents which refer to the operating agreement.

MR. JOHNSTON: Yes. They -- they got disclosure of the plan, the disclosure statement which repeats what's in the plan.

THE COURT: Right.

MR. JOHNSTON: And the MDA which repeats what's in the plan.

THE COURT: But, I guess, I mean, in some sense it seems to me to be kind of a red herring also, because the operative word is "distribution" and if you -- if you leave aside, as largely I have done, the argument that you have to fit into Article 5 --

MR. JOHNSTON: Right.

THE COURT: -- and that, you know, there could be certain types of distributions, but they're not Article 5 distributions so, therefore, you're not covered. If you leave that -- if you leave that out, I -- I just can't see that this -- the issuance of the stock is a distribution. I just don't -- I mean, I don't --

MR. JOHNSTON: Well, at the end of the day --

THE COURT: I don't -- I don't see how it could be a distribution.

MR. JOHNSTON: At the end of the day it enabled the members of DAL to, when you combine it with PBGC and GM, to put in ten plus billion dollars into their pocket. I think if -- if you rolled back in time to when this provision was being drafted, was being added to the plan and you asked the unsecured creditors' committee if the members of the company buyer were going to put $10 billion into their pocket would unsecured creditors be entitled to their three-hundred-million-dollar distribution the answer would have been yes. And I think --

THE COURT: Yes.

MR. JOHNSTON: -- discovery will show that.

THE COURT: I mean, you weren't there and I was, but I'm not -- I'm trying to keep that out of my mind.

MR. JOHNSTON: Uh-huh.

THE COURT: But that wasn't the deal.

MR. JOHNSTON: Okay. Thank you.

THE COURT: If it was they would have gotten warrants or CVRs. But I'm leaving that out of my mind.

All right. I have before me in this adversary proceeding a motion by the defendants, Delphi Automotive PLC, DIP Holdco III, LLC and DIP Holdco, LLP, d/b/a Delphi Automotive, LLP to dismiss the adversary proceeding under Bankruptcy Rule 7012. That Rule incorporates Federal Rule of Civil Procedure 12(b)(6), which is the Rule that the movants here are relying upon.

Under that Rule the Court, in considering whether the complaint sets forth a claim, may consider facts stated on the face of the complaint and the documents appended to the complaint or incorporated in the complaint by reference as well as matters of which judicial notice may be taken and documents that are not specifically incorporated by reference but upon which the complaint heavily relies. See, e.g., DiFalco v. MSNBC Cable, LLC, 622 F.3d. 104-11 (2d Cir. 2011).

The Court must accept the complaint's factual allegations as true and draw reasonable inferences in the plaintiffs' favor. But the Court is not bound to accept as true legal conclusions couched as factual allegations or allegations that are clearly contradicted by documents incorporated into the pleadings by reference or upon which the complaint relies. In addition, where such issues are relevant, i.e. where the Court is not relying upon the plain meaning of documents, for example, or obviously, clear issues of law, the complaint must also state a claim for relief that's plausible on its face -- which does not establish a probability requirement, but, rather, in the light of the Court's experience and common sense would show, in the particular context, the plaintiff has not asserted a claim that is even plausible. See, generally, Bell Atlantic Corp. v. Twombley, 550 U.S. 544-555 (2007) and Ashcroft v Iqbal, 129 S.Ct. 1937-49 (2009).

Here, the complaint, in essence, although it also asserts breach of contract claims and related claims, seeks to enforce under 11 U.S.C. Section 1142 the modified chapter 11 Plan in this chapter 11 case and, more specifically, provisions of that plan that provide a contingent right of the unsecured creditor class, or the general unsecured creditor class, to what is referred to as the “General Unsecured MDA Distribution.”

The plan sets forth a mechanism pursuant to which unsecured creditors would receive their pro rata share of the General MDA Distribution and defines that term; that is, General Unsecured MDA Distribution, in -- in Paragraph 1.102. The term means:

"If and to the extent Company Buyer makes distributions to its members in accordance with the Company Buyer Operating Agreement, as described in Section 3.23 of the Master Disposition Agreement, in excess of $7.2 billion, an amount equal to $32.50 for every $67.50 so distributed in excess of 7.2 billion; provided, however, that in no event shall the General Unsecured MDA Distribution exceed $300 million in the aggregate."

The Company Buyer is defined in Paragraph 1.36 of the modified plan as "DIP Holdco, III, LLC on behalf of itself and other buyers as set forth in the Master Disposition Agreement, as assignees of the rights of the DIP agent to the Company Acquired Assets in connection with the Credit Bid."

It's acknowledged that DIP Holdco, III, LLC, which is one of the defendants here, was succeeded by Delphi Automotive -- I'm sorry -- well, DIP Holdco, LLP d/b/a Delphi Automotive, LLP, or DAL.

Section 3.2.3 of the Master Disposition Agreement states:

"To the extent payable following the closing, the Company Buyer shall pay to a disbursement agent such amounts payable to the unsecured creditors of Delphi and the filing affiliates pursuant to the plan of reorganization as filed on the date of execution of this agreement without modification as to the consideration to be paid under this Section 3.2.3 unless consented to by Company Buyer in the form of Company Buyer Operating Agreement included as an exhibit to the Securities' Purchase Agreement as in effect as of the date hereof, regardless of whether such agreement is subsequently amended for distribution to such unsecured creditors of Delphi and their filing affiliates subject to the terms, conditions and limits as set forth in the plan of reorganization and such Operating Agreement, which payment to such disbursement agent shall be made only if the transactions contemplated hereby are consummated pursuant to a plan of reorganization and which payment shall not exceed $300 million in the aggregate."

The Company Operating Agreement, as referred to in Section 3.2.3 of the MDA and, therefore, as referred to in Paragraph 1.102 of the modified plan, it is agreed, was, in fact, executed and is attached as an exhibit to the Kaminetzsky declaration submitted in support of the present motion.

The complaint contends that, in essence, the 7.2

billion-dollar threshold for the commencement of -- or the fixing of the general unsecureds' rights under the plan to their distribution has occurred. The complaint contends that it occurred based upon two transactions in the aggregate (although there's another ninety-five-million-dollar tax distribution that is also included in the complaint, but standing on its own would obviously not trigger the 7.2 billion-dollar-threshold).

The complaint asserts that under the Operating Agreement the DAL limited partnership redeemed approximately $4.7 billion from holders of interests in DAL, namely GM and the PBGC. In addition, the complaint asserts that pursuant to an integrated IPO transaction the ownership interests in DAL were exchanged for stock in the third defendant in this adversary proceeding, which is Delphi Automotive, PLC, or DAP, that stock was issued to the public or -- DAP's stock -- other stock -- was issued to the public, which created a, or established a market value for such stock of in excess of $7.2 billion, in fact, over $10 billion.

The complaint alleges that those two sets of transactions, the redemptions with respect to GM and PBGC and the going-public transaction, including the exchange of partnership interests for stock, were “distributions” that would fall within the definition of paragraph 1.102 of the plan by the Company buyer, DAL, to its members in accordance

with the Operating Agreement, and that, therefore, as of today it is clear that $300 million should be set aside by either DAL or DAP for distribution to the unsecured creditors under the plan.

The defendants contend as the basis for their motion to dismiss a number of things. I conclude that the most important thing that they contend, and the dispositive thing that they contend, requires the grant of their motion.

They assert that the exchange of limited partnership interests in DAL for public stock in DAP is not a distribution under the Operating Agreement or as a matter of law. They contend in this respect, among other things, that distributions under the Operating Agreement for purposes of the 7.2 billion-dollar-threshold and the right of unsecured creditors to recover under the plan are governed by Paragraph 5.6 of the Operating Agreement, which states that:

"In accordance with Section 3.2.3 of the MDA if the asset purchase is consummated pursuant to the plan of reorganization, once an aggregate of $7.2 billion has been paid as Distributions to the holders pursuant to this agreement, the Company shall pay an amount equal to $32.50 to a disbursement agent on behalf of the unsecured creditors of Old Delphi for every $67.50 in excess of such $7.2 billion that is distributed to the holders pursuant to

Section 5.1(a)(iv) up to a maximum amount of $300 million."

They point out that the word “Distributions,” which is used in that section, is defined on Page 4 of the Operating Agreement as:

"Each distribution after the effective date made by the Company to a member whether in cash, property or securities of the Company pursuant to or in respect of Article 5 or Article 10."

They contend that the exchange of partnership interests in DAL for stock in DAP [see paragraphs 14, 47, 53, and 54 of the Complaint] does not fall within this distribution definition, or use of the term “distribution” in Section 5.6 of the Operating Agreement, but, rather, was specifically contemplated in a different section of the operating agreement, Section 14.13(b), which does, in fact, provide for the conversion of DAL into a corporation and the contribution of the respective membership interests to that corporation in return for the stock of that corporation, again, all for the purpose of implementing an initial public offering.

The provision that I'm referring to, Section 14.13 states that the common equity securities of the issuer, i.e. DAP, would be provided in exchange to the members reflecting the residual interests of the members pursuant to Section 5.1(a)(iv) of the Operating Agreement, as shall be diluted

in ways that are irrelevant to the present dispute.

The movants contend, therefore, that such an exchange as specifically contemplated under Section 14.13 does not fall within Article 5 of the Operating Agreement or more specifically, Section 5.6, in that it is not a distribution of the assets of DAL, but rather an exchange of the ownership interests in DAL [for ownership interest in DAP by the limited partners of DAL].

While it is clear from the operative documents that the term “distributions” can include assets other than cash, I believe it's plain from the terms of the agreement that those assets need to be assets of DAL rather than interests in DAL. It appears clear to me, therefore, that based on the plain language of the Operating Agreement, which does, I believe, clearly govern the general unsecured creditors' right to their contingent distribution, the exchange of limited partnership ownership interests in DAL for stock in DAP merely changes the ownership interests that the holders had, as opposed to resulting in a distribution to them for purposes of the plan.

It is certainly true that the exchange and related IPO enabled the owners of DAL to more successfully and efficiently monetize their interests. Their receipt of the DAP stock was a step in the going-public transaction, and that transaction created a more efficient and widespread

market for those interests. But, ultimately, it was the same enterprise that they owned. It is clear to me from reading the relevant provision of the plan as well as the Operating Agreement that what the plan contemplated was a distribution not in respect of the ownership of those who had shares or limited partnership interests in the Company Buyer, but of the Company Buyer's assets itself.

It is clear to me that if, in fact, the plan contemplated the former, i.e. the right to up to 300 million being triggered by the value of the owners of the Company Buyer's interests exceeding $7.2 billion, it would not have been drafted in the way it has been drafted, but what -- rather it would have been tied to the value of the interests, either directly through a valuation mechanism or, more likely, through the distribution of rights that would ride along with or could be monetized at the same time that the owners monetized their interests, i.e. either in the form of warrants or contingent value rights or the like.

I do not believe, therefore, that the issuance of DAP stock and the exchange of that stock for the ownership interests [of the limited partners] in DAL constitutes a "distribution" under the plain language of Paragraph 1.102 of the modified plan. This is really separate and apart from whether "distributions" under that paragraph should be read as "Distributions" under the Operating Agreement, or

not, but simply in terms of the operative language as a description of a distribution by the Company Buyer.

Let me be clear on this point. I do not believe that the Company Buyer made a distribution by simply facilitating the exchange of ownership interests between DAP and the limited partners. So I am not relying on the fact that what the limited partners received came not from DAL, but rather from DAP.

It's conceivable to me, for example, that if DAL transferred material assets to another entity and then that entity transferred those assets to the holders of limited partnership interests, such a distribution, even though it might not be a “Distribution,” would probably violate and/or trigger, if it exceeded the 7.2 billion-dollar-threshold, Paragraph 1.102 of the modified plan. But that's not what happened here. The owners of DAL did not receive DAL's assets.

This may seem and probably does seem to the general unsecured creditors to be unfair. However, it was the bargain that was struck by the terms of the plain language of the plan. And I cannot undo the plan. I can only enforce it under Section 1142 of the Bankruptcy Code.

There's no allegation here of any fraud in connection with the obtaining of confirmation of the plan, the plan has been fully consummated and the statutory period

has long expired to challenge it and undo it.

In that regard, whether the Operating Agreement was "a secret agreement" or not, I believe, is irrelevant since there's no allegation of any fraud in connection with this transaction being put before this Court, in connection with confirmation of the modified plan.

Moreover, the supplemental disclosure made by the debtors in connection with the plan modification motion and the terms of the modified plan itself lead one quickly and inescapably to the Company Operating Agreement. I can take judicial notice of the fact that there was -- there was no motion made by any party who was not entitled to see the Company Operating Agreement to obtain permission to see such agreement.

I believe it's a matter of common sense that the fiduciaries representing the unsecured creditors, most importantly the unsecured creditors' committee did, in fact, see the agreement and knew what it said. But even if they didn't, they had the right to. And everyone in the case had the right to ask to see it.

So there's, I believe, no basis for contending that it should not inform the Court's interpretation of the right accorded to the general unsecured creditors under the plan to this contingent distribution.

Given that it is necessary from the face of the

complaint to treat the IPO stock issuance [and exchange] as a "distribution" for purposes of the plan before the 7.2 billion-dollar-threshold is met, I believe that it would be improper to consider whether the other transactions described in the complaint, namely the GM and PBGC transactions, would contribute to reaching the 7.2 billion-dollar-threshold.

The parties have made their arguments both ways on that point, but I believe both of them acknowledge that given the shortfall of approximately $2.4 billion, it would be improper to consider that issue in a vacuum, i.e. whether Section 5.6 of the Operating Agreement as well as Section 12.2 preclude treating the very significant payments made by DAL to GM and PBGC as distributions for purposes of Section 1.102 of the plan.

So I will not go further on that point, but I do not believe that, at this point, even if I ruled in favor of the plaintiffs on this argument, the matter would be ripe for any of the relief requested in the complaint, including the request for declaratory judgment, since (a) there would not be a breach yet because the 7.2 billion-dollar threshold had not been reached, and (b) the gap before the 7.2 billion-dollar threshold would be reached is so significant that it would not be proper to grant declarative relief and subject the parties to the costs of litigation and appeals

when it's far from clear to me that there's any imminence of the 7.2 billion-dollar threshold being met. See Olin Corp v. Consolidated Aluminum Corp, 5 F.3d. 10, 17, (2d Cir. 1993).

On the other hand, as I think I've made clear during oral argument, if, in fact, either DAL or DAP make a -- make distributions out of their assets to the owners which, when coupled with the payments that have already been made to GM and PBGC come close to or go over the 7.2 billion-dollar threshold, I believe that there would, in fact, be a basis for seeking declaratory relief, although I'm not going to rule today how I would determine such a request.

So for those reasons I'll -- I'll grant the motion to dismiss. The request was made to dismiss with prejudice. I will dismiss with prejudice as to the IPO transaction, but not as to the other claims, since, as I've said, I'm -- I'm really not ruling on the other claim distributions. And that goes for all of the counts in the complaint.

And as I stated before, my ruling with respect to this matter is based upon the plain language of the plan, first and foremost, as well as the Operating Agreement and, accordingly, my belief that there's no breach and to the extent it exists, and it's questionable given 1142 of the Bankruptcy Code, any duty of good faith and fair dealing,

since that good faith and fair dealing duty is overridden here by the clear language of the agreement which was set forth in the plan.

So the defendants can submit that order. You don't need to settle it on Dewey LeBoeuf, but you should run it by counsel beforehand just so that he's comfortable it's consistent with my ruling and then you can email it to chambers.

MR. KAMINETZSKY: Thank you.

THE COURT: I -- there was a request for leave to modify or sort of a request in the opposition to the motion. My -- my practice generally is unless I believe there's -- there's no basis to -- to improve on a cause of action -- and here I've -- I've said that with respect to the IPO cause of action, to deal with those issues only if there actually is a motion filed. So I'm -- I'm not really dealing with that issue at this point.

And, again, as I think I made clear, if actual distributions by DAL or DAP get up towards the $7.2 billion when you factor in the GM and PBGC distributions, I can certainly conceive of a situation where a new complaint could be filed, which is why I'm not dismissing the complaint as a whole with prejudice, but only in respect to that component of it that deals with the IPO.

Okay. Thank you.

MR. CAMPANARIO: Thank you, Your Honor.

THE COURT: All right.

(Whereupon these proceedings were concluded at 1:41 p.m.)

I N D E X

RULINGS

C E R T I F I C A T I O N

I, Sherri L. Breach, CERT*D-397, certified that the foregoing transcript is a true and accurate record of the proceedings.

SHERRI L. BREACH

AAERT Certified Electronic Reporter & Transcriber

CERT*D -397

Veritext

200 Old Country Road

Suite 580

Mineola, NY 11501

Date: March 25, 2012